

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF PUERTO RICO

3 **ALMA SIMONET, ET AL,** \* CV. 06-01230 (GAG)  
\* COA 09-2434  
4 Plaintiffs, \*  
\* San Juan, Puerto Rico  
5 vs. \*  
\* 27 July 2009  
6 **SMITHKLINE BEECHAM CORP.,** \*  
\* d/b/a/ GLAXOSMITHKLINE PUERTO \* 4:00 p.m.  
7 **RICO, INC., ET AL,** \*  
\*  
8 Defendants. \*  
9 \*

10  
11 **FINAL FAIRNESS HEARING**

12 BEFORE THE HONORABLE **GUSTAVO A. GELPÍ**  
13 UNITED STATES DISTRICT COURT JUDGE

14 **APPEARANCES**

15 COUNSEL FOR THE PLAINTIFFS  
16 **JOHN NEVARES, ESQ.**  
17 **CAMILO SALAS, ESQ.**  
18 **CARLOS RAMIREZ, ESQ.**  
19 **JEFF WEINSTEIN (PHV), ESQ.**  
20 **HERBERT BROWN, ESQ.**  
21 **FRANK INSERNI, ESQ.**  
22 **MICHELLE BONILLA, SOTOMAYOR, ESQ.**  
23 **EUGENIO E. IBARRA, PEREIRA, ESQ.**  
24 **WELLS G. WILKINSON (PHV), ESQ.**

25 COUNSEL FOR THE DEFENDANTS

**ANY ROSSELL BARRIOS, ESQ.**  
**FRED HEROLD (PHV), ESQ.**

**YVETTE RICHARDSON, CSR, RPR, CCR**  
**(787) 772-3476**

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

2

P R O C E E D I N G S

THE COURT: Now let's call the Simonet case.

THE CLERK: In civil case 06-1230.

Proceedings: Final fairness hearing. Plaintiffs of record shall identify themselves for the Court.

MR. NEVARES: Good afternoon, Your Honor. My name is John Nevares and I represent class counsel together with Mr. Camilo Salas and Mr. Brian Strange.

MR. BARRIOS: Good afternoon, Your Honor. Rossell Barrios representing defendants.

MR. HEROLD: Good afternoon, Your Honor. Fred Herold, also representing the defendants.

THE COURT: Okay.

MR. WEINSTEIN: Your Honor, Jeff Weinstein representing Clay Bain, objector, and you have allowed me to be admitted pro hac. Thank you. And I am here with local cocounsel, Mr. Herbert Brown.

MS. BONILLA: Good afternoon, Michelle Bonilla Sotomayor in representation of objectors, William and Catherine McWhorter and Susan Colvin.

THE COURT: Mr. Inserni.

MR. INSERNI: Frank Inserni. I am pro hac vice for the estate of Keith Allen and one of the objectors to the settlement.

THE COURT: You are not pro hac vice.

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

3

1 MR. INSERNI: I am sorry. I am local counsel. Pro hac  
2 vice counsel, Mr. John Spence.

3 THE COURT: Mr. Spence is not here.

4 MR. WILKINSON: Good afternoon, Your Honor. My name is  
5 Wells Wilkinson. I am an attorney here on behalf of objector  
6 Diane M. Fox and I am here with local counsel, Raul Mariani.

7 MR. MARIANI: Good afternoon, Your Honor.

8 THE COURT: At least in Mr. Mariani's and in  
9 Mr. Brown's case, if you want to stay here, of course, you are  
10 not going to be doing the argument, you are welcome to stay. I  
11 know Mr. Mariani wants to be excused. Of course, you are  
12 welcomed. If you want to participate you may participate, but  
13 I have no problem with having pro hac vice counsel, by  
14 themselves, argue the case.

15 What we will begin by doing is, and again, I intend to  
16 hear everybody. I will be recessing around 3:30 or 4:00 at the  
17 latest. If we need to continue we will continue tomorrow.  
18 Everybody will be heard. There have been a lot of motions. I  
19 think everything has been ruled upon. There are a couple in  
20 abeyance pending. What I would propose then is that, first,  
21 counsel for plaintiffs go first. Then counsel for  
22 GlaxoSmithKline go next and then we will have the objectors  
23 counsel go next. I know there have been some objections filed  
24 but counsel are not here or it is impossible for them to come.  
25 My inclination is to consider them along with all other

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

4

1 objections. And that's my inclination, but I can hear from  
2 counsel before I make a final ruling as to that.

3 Mr. Strange, please go ahead.

4 MR. STRANGE: Thank you, Your Honor, and good  
5 afternoon. Brian Strange for the plaintiff class. If it is  
6 acceptable to the Court I would propose that I would address  
7 the issue of the final fairness of the settlement and the  
8 objections, as they pertain to the settlement; and Mr. Nevares  
9 will address the issue of attorney's fees and the objections,  
10 as they pertain to the attorney's fees.

11 Your Honor, this case began in 2004 in California. As  
12 Your Honor is aware, my firm along with two other firms  
13 initiated the case in 2004 in California.

14 THE COURT: In state court, correct?

15 MR. STRANGE: In state court. It was a very vigorous  
16 litigation. There were nine motions to dismiss, including two  
17 motions for judgments on the pleadings regarding preemption.  
18 There was four amended complaints. There were writs of mandate  
19 to the Court of Appeals. There were 11 status conferences over  
20 the five years. There were tens of thousands of documents  
21 produced by GlaxoSmithKline. There was a discovery referee  
22 appointed who addressed numerous discovery motions to compel.  
23 There was numerous witness interviews that we conducted with  
24 respect to employees and former employees at the plant here in  
25 Puerto Rico. There were expert witnesses that we retained,

YVETTE RICHARDSON, CSR, RPR, CCR

1     formerly employed by the FDA, regarding the status of the  
2     production of the drug called Paxil here in Puerto Rico.

3             The essence of our case, Your Honor, and the reason  
4     there were so many substantive motions to dismiss, which in  
5     California state court we call demurrers, is because we  
6     contended, the plaintiffs, that we were entitled to seek only  
7     economic injury for the purchases of defective Paxil. Our case  
8     did not concern personal injuries. So the big issue that  
9     GlaxoSmithKline raised is if you received a pill you have to  
10    prove that it didn't work or how have you been injured.

11            And so there was a big causation issue and a big damage  
12    issue. And, ultimately, we focused, Your Honor, on receiving  
13    split pills. Our contention was that because of the defects in  
14    manufacturing the pills split apart.

15            So we began to do and did extensive analysis in the  
16    case about how many -- what is the extent of damages; how many  
17    split pills were there. And we still, mind you, have the  
18    problem of did our plaintiffs receive a split pill. And, if  
19    so, can they produce it?

20            So the legal question of whether there was damages, and  
21    then the factual issue of how many damages -- how much of the  
22    pills were manufactured with the split-pill problem became an  
23    issue. GSK contended, based on documents in their files, that  
24    only eight parts in a million of these Paxil pills had the  
25    problem with splitting apart. We both agreed that there were

**06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS**

6

1 approximately 700 million Paxil pills produced and sold during  
2 the class period. And our evidence was, and our best argument  
3 was approximately two percent of all the pills they produced  
4 have the problem with splitting apart.

5 So the damages, Your Honor, range from 8 parts to a  
6 million to this two percent or approximately 50,000 to the  
7 outside of 42 million, if we prevailed on our theory of damages  
8 and through class certification.

9 And in our case, by the way, we filed two extensive  
10 motions for class certification, which have not been ruled  
11 upon, but include all the affidavits from our experts and our  
12 physicians on class certification. The reason there were two,  
13 Your Honor, is that we did add a third party payor, Universal  
14 Care, into the case and then filed an additional class  
15 certification on that issue.

16 So, when ultimately we began discussing settlement with  
17 SmithKline we, the plaintiffs, combined our case with the  
18 Simonet case down here so we could come to some kind global  
19 resolution if possible. And we came to settlement discussions  
20 that lasted individually and collectively over a year with  
21 SmithKline counsel. And SmithKline's position, not  
22 surprising,ly was that our case wasn't worth much. As the  
23 plaintiffs, we obviously vigorously disputed that. And after  
24 extensive negotiations we were able to convince SmithKline to  
25 settle for 28 million dollars; up to 28 million dollars, which,

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

7

1 based on the facts of this case, is, in our opinion, a  
2 spectacular settlement because of the offer, because of the  
3 problems of proof, the problems of damages and the problems  
4 with liability.

5 And we, ultimately, split the 28 million with 40  
6 percent going to the third-party payors. That is 11.2 million  
7 in a cash fund to the third-party payors and 60 percent to the  
8 consumers or 16.8 million available to the consumers to claim.

9 We then presented to Your Honor on March 2nd a  
10 preliminary approval motion.

11 THE COURT: Before you go into that, I believe, and it  
12 is important for the record, I believe there was a motion to  
13 dismiss filed in this case; am I correct?

14 MR. STRANGE: In the Simonet case there was a motion to  
15 dismiss filed before Your Honor and Your Honor did reissue an  
16 opinion on it.

17 THE COURT: There was an opinion because I do remember  
18 it took considerable time. And there were replies and  
19 surreplies. And I do remember Mr. Barrios, when he came in,  
20 had to request several continuances because when -- Mr. Barrios  
21 can speak about this, but I think it was the representation at  
22 that point -- again, it was not a simple 12(B)(6) motion. And  
23 it was pretty complicated and the opinion order was 20 or 25  
24 pages long.

25 MR. STRANGE: Yes, Your Honor, and we did in California

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

8

1 follow that opinion closely in your case. And it is not unlike  
2 the complicated decisions that our court had to decide either.

3 THE COURT: And let me ask one thing, and also I want  
4 to hear from GSK. Let me not assume, but let me ask, did that  
5 opinion or that ruling that I issued also carry some weight, I  
6 assume, in the settlement negotiations; am I correct?

7 MR. STRANGE: Yes, Your Honor, it did. It was very  
8 instrumental in at least getting GlaxoSmithKline to the table.  
9 Obviously if they had won they wouldn't have settled my case  
10 either.

11 THE COURT: We wouldn't be here.

12 MR. STRANGE: We wouldn't be here. But recognizing  
13 from both sides that that was both a difficult, very  
14 complicated issue. And only one of the many issues that we  
15 were going to face along the road, both in class certification  
16 and, ultimately, should we come to a trial, whether we can  
17 prove the plaintiffs had split pills. And, if so, even if they  
18 had a split pill, what effect, how were they damaged by that.  
19 The difficulty is we are dealing with economic damages and not  
20 personal injury claims.

21 So, ultimately, after extensive negotiations we did get  
22 what we believed to be an excellent settlement for the class in  
23 this case with respect to the split pill issue. Your Honor had  
24 a preliminary approval hearing on March 2nd where you approved  
25 a rigorous notice program. We hired Cancilla Media, who is a



06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

9

1 recognized expert in the class action notice arena. They have  
2 filed two declarations with the Court outlining the notice.  
3 But suffice it to say that Cancilla Media has been involved in  
4 over 500 notice programs, hundreds of millions of dollars they  
5 spent in media. They have qualified as an expert in numerous  
6 federal courts regarding notice. And they have opined in this  
7 case both in the preliminary approval stage and in response to  
8 objections about notice that this notice meets all the  
9 requirements of Rule 23. We provided direct notice to the  
10 third-party payor class which we were able to obtain the names  
11 and addresses through information by Mr. Miller's firm,  
12 indicated in the notice. We had a broad notice for paid media  
13 which included over 2,100 newspapers, every major media market  
14 in the country. We had, in addition, consumer magazines such  
15 as *NewsWeek*, *People* and *TV Guide* and various trade magazines  
16 with third-party payors. We also had TV spots regarding the  
17 settlement occurred 72 times on CBS, CNN Evening News, CNN  
18 News, Lifetime Movie Channel and the Movie Channel and the  
19 Hallmark Channel; and we also had a press release that went to  
20 over 4,500 outlets. We had a dedicated website. We did a word  
21 search on Google and Yahoo, and we have an opinion from our  
22 expert that they reached over 80 percent of the market with  
23 respect to this extensive notice which cost well in excess of a  
24 million dollars.

25 After receiving the notice we are here today for a

YVETTE RICHARDSON, CSR, RPR, CCR

1 final approval. We have -- my firm has, in particular, been  
2 certified as class counsel in numerous cases throughout the  
3 country. And, in fact, we have settled regarding the issue of  
4 Paxil that was sold to children in a case called Hormon which  
5 was in state court in Illinois on a national settlement and a  
6 third-party payor case in Minnesota on a national settlement  
7 approved by the court there. So we have experienced counsel  
8 both on the plaintiff's side, Mr. Nevares and Mr. Solas, and  
9 also on GSK's side.

10 And we have, after all that notice, we are down to,  
11 really, four objections that I would like to briefly address at  
12 least as the objections pertain to the final fairness hearing.

13 One objection -- first, I might state, in due respect,  
14 the objectors are not unknown to me, having settled numerous  
15 class actions. All of the objectors have objected in numerous  
16 other cases after a settlement has been obtained.

17 Mr. Pentz, who represents the Sweeney objectors, who  
18 apparently is not here today, has personally -- is a  
19 professional objector who has objected in at least five of my  
20 personal cases, including a case against Fleet Bank, a case  
21 against CitiBank, a case against Sprint up in New Jersey.

22 THE COURT: Is he an attorney or he is just -- I know  
23 there was somebody who objected who is not an attorney who I  
24 did not allow to object.

25 MR. STRANGE: Yes, you struck the Sweeney objection

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

11

1 because he wasn't a lawyer and then he brought in Mr. Pentz who  
2 is a lawyer who is not here today, but who requested to be, I  
3 think, admitted pro hac vice.

4 THE COURT: That is through Mr. Inserni. Okay.

5 MR. STRANGE: Yes, Your Honor.

6 THE COURT: So he is represented by counsel.

7 MR. STRANGE: Yes, Honor. And First U.S.A. is another  
8 case so Mr. Pentz has objected in numerous cases. Mr.  
9 Weinstein, who is here today, is from Texas. And just doing a  
10 quick search on Lexus he has objected in the In Re: Pet Food  
11 Products litigation, Park vs. Thomas, McCoy vs. Health Net,  
12 McGee vs. Continental Tire, Progressive Corp. vs. Corp.  
13 Underwriting and In Re: Ford Explorer cases, just to name a  
14 few. And the PAL Prescription Coalition has also previously  
15 objected in our cases in Illinois and the one in Minnesota.  
16 Both objections were overruled. One of them was withdrawn  
17 ultimately.

18 And the McWhorter objectors, interestingly, I was not  
19 familiar with them. But they are actually listed in the  
20 Nichols versus SmithKline case as an objector where their  
21 objections, same objections, similar objections were overruled  
22 in that case which is cited in our papers.

23 To get to the substance of the objections, Your Honor,  
24 the first with respect to the argument that you can't certify a  
25 national class because of differing state laws, national

1 classes based on differing state laws are certified almost  
2 routinely in this country every day. The AM-CAM case by the  
3 Supreme Court actually, I think, supports our position because  
4 that case holds that in a settlement context the issue of  
5 manageability is not one that would preclude settlement because  
6 you are not having a trial. You don't have to manage the  
7 trial.

8 And one of the objections raised with respect to  
9 varying state laws is you have to have different kinds of jury  
10 instructions with potentially different elements to be proved  
11 and different burdens of proof. And in a settlement context,  
12 as the Supreme Court points out, that issue goes away because  
13 you don't have a trial. And that is supported by this circuit  
14 in the waste management case that we cited. In the Warfarin  
15 case which is a 3rd Circuit case, which is a drug-related case  
16 on behalf of third-party payors and consumers, just like this  
17 case, the Court was faced with that issue and overruled that  
18 objection.

19 THE COURT: Let me interrupt. I understand that if  
20 this case were to go to trial there is also the issue that  
21 different state laws apply. Not under the law of every state  
22 you would have the exact same claims. The instructions may be  
23 different, but the law may be different in different states.  
24 And in some states you may have X claim under -- again, I think  
25 in my opinion I went through all the different laws of the

1 different states. A lot of states are alike in a lot of  
2 things, but there are some differences.

3 MR. STRANGE: Yes, Your Honor. There are similar  
4 states and then there are the different states. But, as the  
5 Supreme Court points out, that that issue of, you know, how to  
6 manage different state laws goes away in a settlement context  
7 because you are not having a trial.

8 And so the -- clearly the majority of cases that have  
9 considered that issue have held that a national settlement is  
10 appropriate. And, as I mentioned, in the Warfarin case  
11 particularly the Court dealt with a case very similar to this  
12 one. I also might point out, Your Honor, that in the Hormon  
13 case which is a state court case against GlaxoSmithKline that  
14 was settled, the court certified a national class with  
15 differing state laws, and also in the federal case in Minnesota  
16 we were involved in the Court certified a national case with  
17 different state laws.

18 And, finally, I would point out that the objectors  
19 raise an issue of privity required in some laws, but not other  
20 laws. But that is not true of all our claims. And the  
21 controlling authority says you don't have to have identical  
22 claims and identical facts in order to certify a case on a  
23 national basis.

24 The only case the defendants have or the objections  
25 have come up to is in the In Re: Grand Theft Auto case, which a

1 district court decision. But in that case you need to look at  
2 the facts of obviously each of the cases. And in that case it  
3 involved a grand theft auto game. And the contention of the  
4 plaintiffs was that the rating was incorrect because if you  
5 knew how to manipulate the game you could get into the part of  
6 the game that had some inappropriate sexual content. And the  
7 court in that case noted that the evidence was that 2/3 of the  
8 class did not even know about that. Even if they knew about it  
9 you had to be personally able to manipulate the game or hire a  
10 third party to change the game. So the defendant had an  
11 unclean hands defense that said if you didn't like the sexual  
12 content why were you hiring someone to get to that part of the  
13 game.

14 So the facts of that case are distinctly different from  
15 this case where we are contending based on the defendant's  
16 conduct in manufacturing these pills, which is the same for all  
17 the plaintiffs, that the pills were defective and could  
18 potentially split apart.

19 So, we have cited extensively in our brief to all of  
20 the cases which have held that certification of a case in this  
21 instance is completely appropriate. Not only appropriate, but  
22 encouraged.

23 The other objection I wanted to mention, Your Honor, is  
24 with respect to the claims-made portion of this settlement for  
25 the consumers only. The third-party payors, of course, are

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

15

1 paid based on their -- how many covered lives they have. With  
2 respect to the claims made of the consumers, that was a  
3 negotiated term that we fought with GSK on. And the fact that  
4 we have an extensive notice program and the ability of  
5 consumers to make claims, these types of claims-made  
6 settlements are routinely approved; and, in fact, were approved  
7 in the Hormon case, which was a claims-made settlement based on  
8 Paxil. And there is no case that says it is inappropriate to  
9 have a claims-made settlement or that reversion, if you want to  
10 call it that, is inappropriate. In fact, the cases that we  
11 cited to Your Honor specifically held that that is an  
12 appropriate feature of a negotiated settlement.

13 The next issue I wanted to mention is notice. With  
14 respect to the notices, I have indicated that we have a very  
15 robust notice program. There was -- there is an argument by  
16 PAL, the prescription access group, that the notice is  
17 insufficient because we should have subpoenaed all the  
18 pharmacies.

19 But that, I submit, there has only been a few cases  
20 that have done that. We have mentioned them by our  
21 supplemental experts' declaration. Two of those cases involve  
22 U.S. attorneys who negotiated with the pharmacies. The third  
23 was an order from the Court.

24 In these circumstances there are two distinct  
25 differences. One, of course, we have a major rights of privacy

YVETTE RICHARDSON, CSR, RPR, CCR

1 issues if we were to try to subpoena pharmacies. The rights of  
2 the patients not to have that information released would be a  
3 massive issue that would have to be dealt with both by our  
4 clients, the class, and by the pharmacies.

5 And, moreover, in this case, Your Honor, our definition  
6 is all those people that purchased Paxil, but the people that  
7 make claims are those with the split pills. In the cases, in  
8 the very, very few cases that have subpoenaed pharmacies, they  
9 are antitrust cases. So that everybody who is on the list of  
10 the pharmacy would be able to make a claim. So that's not true  
11 here because everybody at the pharmacy would not be able to  
12 make a claim. So it would be very overinclusive, very  
13 expensive, and not appropriate on the facts of this case.

14 The other objection with respect to notice was that the  
15 notice should have said something about reversion and should  
16 have said something about the size of the class and the amount  
17 of the claims.

18 This specific type of objection was overruled in the  
19 *Nichols vs. SmithKline* case and has been overruled in numerous  
20 other cases where the courts have held that under Rule 23 the  
21 issue of notice is to give a description of the case and how  
22 people can make a claim and how they can find more information.

23 And that is, specifically, the Court ruled that the  
24 notice in the Nichol's case had a description of the  
25 plaintiff's claims, the general terms of the settlement, the



1 proposed allocation of the fund, the rights being released, and  
2 how people can obtain more information. Those are the exact  
3 items mentioned in our notice.

4 And in the Nichol's case the Court overruled the  
5 objection by the McWhorter people, the same people objecting  
6 here, that the notice had to state the amount of damages  
7 suffered by the class. Where they couldn't assess a fair  
8 assessment of the settlement the Court overruled that objection  
9 because it is not required under Rule 23.

10 The issue of the adequacy of representation, there  
11 seems to be a misunderstanding, but with respect to the  
12 settlement agreement, my firm along with J. D. Horton  
13 represented the third-party payors at this settlement  
14 discussion. Mr. Salas and Mr. Nevares represented the  
15 consumers. So there was separate counsel there.

16 And, finally, Your Honor, with respect to the PAL  
17 organization, they don't have standing to object to the third-  
18 party payors, which is an issue that we raise because they  
19 haven't identified a specific third-party payor that they  
20 represent; and we have cited the appropriate cases for  
21 standing.

22 And in the *Hormon* case they made the same objection and  
23 the Court ruled they didn't have standing there because they  
24 don't represent someone. They have now amended their  
25 objections on behalf of a consumer, Ms. Fox, but I will note

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

18

1 that that objection was made on July 21st. And Your Honor's  
2 order provided that it be filed on the 18th. And so it is  
3 untimely. Even if it wasn't untimely, for reasons I have  
4 articulated it doesn't have merit.

5 THE COURT: When was it actually filed? I gave until  
6 the 18th.

7 MR. STRANGE: I think it was filed on the 21st is the  
8 file stamp. Overall, Your Honor.

9 THE COURT: I assume the 18th was a --

10 MR. STRANGE: It was a Saturday.

11 THE COURT: The 18th.

12 MR. STRANGE: Yes.

13 THE COURT: And probably Monday may have been a local  
14 holiday. I will give the party that. I will give them the  
15 benefit. I believe I can strike that with respect to untimely.

16 MR. STRANGE: I figured you would do that, Your Honor.  
17 And I would like to point out you have been more than generous  
18 with respect to allowing these objections and we have addressed  
19 them as best we can on the merits.

20 But, overall, Your Honor, as Your Honor knows, from the  
21 order you issued and throughout the vigorous defense put up by  
22 GSK in this case, to get a 28 million dollar settlement on  
23 potential damages that could go anywhere, even if we won  
24 liability, from 50,000 to 42 million is a superb settlement.  
25 And I would make one other point, that even if we proceeded to

1 trial and won under the *Boeing* case GSK would be entitled to  
2 reversion of all those damages that weren't claimed by the  
3 plaintiffs.

4 So the result that has been obtained for the class here  
5 is, based on the facts of this case, an excellent one and I  
6 would encourage the Court to approve it in this final fairness  
7 hearing. Unless the Court has any questions, I am finished  
8 with mine.

9 THE COURT: I do have some questions. I am probably  
10 going to do them out of order. But one of the objections is  
11 that since the settlement notice was sent out the date of this  
12 hearing has been changed twice. And there is a claim that, for  
13 example, a class member who wanted to be here today to object  
14 can't be here today because there is no way for him other than  
15 the original date and deadline of knowing when this hearing  
16 would have taken place.

17 Of course, some of the objectors have obviously  
18 appeared here. But I would like to hear from you in that  
19 respect.

20 MR. STRANGE: Yes, Your Honor, the Courts routinely  
21 reserve the right to continue a class fairness hearing, and it  
22 routinely does happen. And in notice we cited various means  
23 for any objector who is interested to determine whether there  
24 has been a continuance either through the web site, through a  
25 toll-free number, through calling counsel.

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

20

1 THE COURT: Let me assume that if I live in Montana or  
2 I live in Iowa or I live in Guam or in Alabama, and I want to  
3 object, if I look at the original notice there is a toll-free  
4 number or there is a web site that will tell me today's date  
5 and hearing.

6 MR. STRANGE: The web site has since changed the date.  
7 The web site didn't originally change the date. But if they  
8 called the toll-free number they would have been provided that  
9 information. And the bottom line, Your Honor, is that --

10 THE COURT: Okay. When was the web site date changed  
11 for today that you have?

12 MR. STRANGE: The date changed to today was fairly  
13 recently. I am not sure of the exact date the web site was  
14 changed. I don't know that, but I don't think the web site  
15 itself -- I could be wrong about this -- I don't think the web  
16 site date was changed on or around the time of your order. I  
17 am not sure about that. But....

18 THE COURT: Let me ask another thing. Let's assume  
19 there was a deadline to object.

20 MR. STRANGE: Yes.

21 THE COURT: And that deadline did not change.

22 That was -- actually, it did change when I extended it.  
23 Was that reflected immediately on the web site or when was that  
24 reflected?

25 MR. STRANGE: I am not sure whether that was reflected

1 in the web site, Your Honor. I mean, normally we probably  
2 wouldn't do that. But with respect to the objectors, to my  
3 knowledge, there certainly isn't a case where someone, you  
4 know, showed up on the original date and then had to change  
5 their -- I mean, everybody that wanted to object, I believe, is  
6 here today.

7 THE COURT: That is great because even if we didn't  
8 have the hearing and somebody showed up I would have been  
9 informed because it has happened. Not in this case, but it has  
10 happened in other cases where persons would send letters. And  
11 I believe everybody who has objected, they are all here today.

12 MR. STRANGE: Yes, Your Honor. I don't think there is  
13 a specific example. It would be a little speculative that  
14 someone who wanted to come didn't come. But, to my knowledge  
15 everyone, that wanted to appear is here today and knew about  
16 the continuance. And, obviously, some people wrote letters  
17 which Your Honor will consider, I understand, today.

18 So to the extent there have been continuances, which  
19 frequently happens, I don't think anybody has been affected by  
20 that, that I am aware of. And everybody has been able to voice  
21 their objections. And, just as a routine matter, the Court in  
22 running its daily calendar is required to continue hearings and  
23 it frequently does happen in these types of cases and everybody  
24 does their best. But there are certainly ways, if someone was  
25 interested, for them to find out about a change in the date.

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

22

1 But, to my knowledge, everyone who wanted to object is here.

2 THE COURT: Okay. Thank you. I have some other  
3 questions, but I think they pertain more towards to what  
4 attorney Nevares will be talking about.

5 MR. STRANGE: Thank you, Your Honor. At this point I  
6 would like to turn the presentation over to Mr. Nevares with  
7 respect to fees and any objections that pertain to those.

8 MR. HEROLD: Your Honor, Fred Herold from GSK. Would  
9 you like to hear GSK's views?

10 THE COURT: I was thinking about it. I think it might  
11 not be as -- it is probably going to be shorter, I think, a lot  
12 of things.

13 Let's do that and then I will hear from Mr. Nevares and  
14 then I will hear from all the objectors.

15 MR. HEROLD: Your Honor, on behalf of GSK, we do agree  
16 with plaintiffs' counsel that the objection should be  
17 overruled. I am going to try to focus on what I think are the  
18 key issues. One is the issue of the split tablets. This case,  
19 as Mr. Strange described, involved a number of difficult  
20 issues, pleading issues, legal issues and factual issues. And  
21 in any settlement there is a lot of negotiation based on the  
22 rulings, and as the case goes on, the development of those  
23 issues.

24 There is one key factual issue here which the parties  
25 have not agreed upon. And that is one of the core issues which

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

23

1 is how many split tablets got out into the market. It's been  
2 GSK's position all along, based on documented studies of the  
3 plant process and inspections, that no more than 8 parts per  
4 million on average got out. And that is based on inspections  
5 that are done. And then when there are split tablets found  
6 there are steps taken after that to try to reduce the number of  
7 split tablets.

8 THE COURT: If that is the number, what would be the  
9 percent under your number? Under that number?

10 MR. HEROLD: Eight parts per million number. Your  
11 Honor, I am not very good at math. But I believe it is .00008,  
12 I believe.

13 THE COURT: Versus what Mr. Strange said, one or two  
14 percent.

15 MR. HEROLD: One or two percent, what the plaintiffs  
16 said consistently. If GSK is correct, as a factual matter,  
17 that no more than eight parts per million got out, we agree  
18 there are 700 million Paxil CR tablets that were related to the  
19 market in the United States during this time period. If you do  
20 the math at eight parts per million you come out with 5,600  
21 split tablets. We also agree there was never a dispute that  
22 the average price of a Paxil CR tablet is three dollars. So if  
23 GSK is right there are 5,600 split tablets out there with a  
24 value of three dollars, the case is worth \$16,600.

25 Now, obviously as Mr. Strange said, the plaintiffs did

YVETTE RICHARDSON, CSR, RPR, CCR

1 not agree with that. That was a matter we had to choose  
2 whether to try or not. GSK is not in a position, nor the  
3 plaintiffs, to say, okay, we know that Mrs. Smith in Oklahoma  
4 got a split tablet. GSK does not have records of who actually  
5 purchased its drugs, who actually take its drugs. There are  
6 all kinds of privacy issues involved in that. GSK sell to a  
7 wholesaler. Doctors prescribes the drugs. GSK knows how many  
8 of its drugs are prescribed, but it doesn't know who takes  
9 them. And none of us are in a position to be able to prove,  
10 and we think this is a strength for GSK in the case, who took a  
11 split tablet, who got a split tablet.

12 So the ultimate compromise that we reached, Your Honor,  
13 in a key part of the settlement here is that GSK agreed to put  
14 up up to 28 million dollars total, 16.8 million, for the  
15 consumer class, which we believe was more than enough by a  
16 factor of almost 1,000 to cover the damages that we think are  
17 out there. As long as that that amount was not claimed,  
18 because we don't think there are that many split tablets out  
19 there, we don't have to pay it. That was a key part of the  
20 settlement.

21 And one of the core objections here is that, you know,  
22 that is not fair. Because GSK should have to pay the whole  
23 thing. Well, we could have gone to trial. And we think we  
24 would have prevailed on the issue of how many split tablets  
25 there were. So that was a key part of the settlement that we



1 will put up the money, but if it is not claimed -- well,  
2 actually the way it works technically, we only pay for the  
3 claims that are made, as Mr. Strange said, it is a claims-made  
4 policy on the consumers' side.

5 The other issue, Your Honor, which is important is we  
6 worked very hard to come up with what we thought was a fair  
7 claims process. Especially for consumers. We have a  
8 two-tiered claims process. A consumer is entitled to fifty  
9 dollars if he or she simply fills out a form, no notary. Some  
10 objections talk about a notary. There is no notary requirement  
11 in the settlement. Simply fills out a form that says, "I  
12 declare under penalty of perjury that I got at least one split  
13 tablet." That is all they have to do.

14 I can tell that you it was a very difficult decision  
15 for GSK to agree to that because we have experience in these  
16 kinds of settlements where that is all you require where you  
17 get a lot of claims that you don't think are legitimate. That  
18 is all we agreed in this case. The minimal amount of fifty  
19 dollars is enough to cover 17 split tablets, 16-2/3 split  
20 tablets at three dollars each. So we think that is a very  
21 generous, very generous and fair process.

22 Now, the odds statistically of someone getting more  
23 than 17 split tablets, one consumer getting more than 17 split  
24 tablets, are extremely small. No matter whose version you  
25 accept, the eight parts per million or the one to two percent.

1 We, therefore, felt if you are going to claim more than that  
2 amount you have to come up with something in addition to your  
3 word. And, again, we were very generous. What we agreed to  
4 was that the consumer would only have to come up with one of  
5 about six or seven things, some kind of demonstration of the  
6 payment or proof of a prescription or even a note from their  
7 doctor. And it doesn't have to say, "I got a split tablet."  
8 The claimant has to say, "I got a split tablet," and a note  
9 from the doctor saying, "I prescribed this patient Paxil CR."  
10 That's it. Very, very minimal. And if one does that they get  
11 fifty dollars plus ten dollars per split tablet on top of tier  
12 one, the minimal amount. Again, we think that is a very  
13 generous, very fair way to administer this settlement. And,  
14 frankly, much more lenient than is typically done.

15 Also, with respect to notice, Your Honor, I would like  
16 to second very strongly what Mr. Strange said about the notion  
17 that we should subpoena pharmacies and get individual  
18 information about the names and addresses of who took Paxil CR  
19 from those pharmacies. That raises a whole host of privacy  
20 issues. There is a federal statute called HIPAA -- just, I  
21 mean one can imagine, if you are taking Paxil CR, which is an  
22 antidepressant, you may not want someone, your local pharmacy,  
23 without your knowledge providing your name and address to  
24 anybody.

25 It is typically not done in these cases. It is

1 extremely unusual.

2 THE COURT: So what would happen is if there is a  
3 subpoena or a court order, what would happen, for example --  
4 let's assume this pharmacy doesn't exist -- but let's assume  
5 there is a Walgreen's pharmacy at 153 Chardon Avenue, across  
6 the street. And let's assume that you get that listing from  
7 that pharmacy. Counsel would have to review it, but from that  
8 listing whoever reads it you find there are 20 people who have  
9 taken Paxil tablets. Among them perhaps -- the problem is,  
10 let's assume a federal judge is taking Paxil, myself. And  
11 let's assume that. But if that is the case, when you get that  
12 discovery I may not want to be a claimant in this case.

13 MR. HEROLD: Exactly, Your Honor.

14 THE COURT: And I don't want anybody knowing. Of  
15 course, the F.B.I. knew it when they did the check. That may  
16 be an issue. I will put myself as an example. It might invade  
17 my privacy. It won't become public, but it will be  
18 disseminated to third parties.

19 MR. HEROLD: That's correct, Your Honor. Especially,  
20 as Mr. Strange said, it is not a case like you have in a  
21 securities case or in an antitrust case where you purchase the  
22 product you are entitled to damages. Here that is just the  
23 first step. If you purchase the product we can send you a  
24 notice voiding all these privacy issues, but then you still  
25 have to personally say you got a split tablet. So it just

1 seems like A) tremendous privacy problems; b) tremendous  
2 overkill in this kind of case.

3 And as the notice expert in this case we have used in  
4 many cases, Cancilla, stated that the program that we had here  
5 was a rigorous program; one that is of the type that is  
6 routinely approved for notice to consumers in these types of  
7 cases.

8 And the other point I just wanted to make on notice is  
9 that there has been a complaint that the notice that went out  
10 didn't adequately notify the consumers of all the details of  
11 the settlement.

12 You can't do that, Your Honor. You can't have a 30- or  
13 40-page settlement agreement sent to everyone interested. It  
14 just doesn't work that way. It is a complicated settlement  
15 agreement, as they all are. You have to come up with a notice  
16 that meets the requirements of Rule 23 and due process. The  
17 notice in this case was extensive. It had a number of Q-and-A  
18 type of sections. And, most importantly, if someone truly was  
19 interested in knowing every detail of the settlement they  
20 easily could have determined that.

21 How? Number one, the settlement was posted on the web  
22 site. The web site address is all over all the notices in  
23 multiple places. All you had to do was go on the web site and  
24 click the settlement agreement and you can read it to your  
25 heart's content. In fact, I shouldn't admit this, but my

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

29

1 filing system in my office leaves a lot to be desired. Often  
2 when I want to find the settlement agreement in this case I go  
3 to the web site. It takes two seconds to get to the settlement  
4 agreement. Very easy. In the notice there are directions if  
5 you want to call a number, if you have questions. It was a  
6 very comprehensive, detailed notice program. And it's just  
7 impractical to require that any notice that goes out to the  
8 public would contain every single detail, you know, of a court  
9 settlement agreement.

10 THE COURT: Let me just ask what would happen if a  
11 71-year-old grandmother who is computer illiterate and she just  
12 watches soap operas during the afternoon and she goes to play  
13 bingo. How would that woman find out about the class action.

14 MR. HEROLD: Well, Your Honor, that woman would find  
15 out in one of the number of ways that Mr. Strange described.  
16 The class -- the notice was published in multiple magazines. I  
17 don't remember, frankly, the specifics of which ones. But  
18 typically it's something like *Reader's Digest*, *Time Magazine*.  
19 There were TV ads taken out. And this is all figured out by  
20 Cancilla who has detailed information about the demographics  
21 reached by different types of magazines. So, for example,  
22 older folks might read *Readers Digest* more and, you know, other  
23 people might read *Business Week*. So they come up with a  
24 program based on all those demographics designed to maximize  
25 the chance that that person is going to get notice.

YVETTE RICHARDSON, CSR, RPR, CCR

1           And once that person gets notice, if they want to know  
2           more and they don't have a computer, all they have to do is  
3           pick up the phone because all the notices, whether it is TV or  
4           in a magazine provide a toll-free number for people to call and  
5           ask questions.

6           And, frankly, Your Honor, that is a good example of the  
7           70-year-old woman in Massachusetts. I doubt is going to call  
8           up and say, "I was thinking about this, but I want to know if  
9           there is a claims-made policy in the reversion." That is not  
10          going to happen. Those kinds of questions are questions that  
11          are reviewed and asked by people who make it their business to  
12          object to settlement agreements across the country and raise  
13          those issues.

14          And, certainly, the proof is in the pudding. Those  
15          folks have emerged in this case and have understood basically  
16          the nature of the settlement and they are here today to bring  
17          up these issues, which are perfectly fine.

18          So, again, it is a balance. If we went out there and  
19          said, now, let's explain the settlement in gory detail the  
20          woman in Massachusetts would be overwhelmed and wouldn't be  
21          able to make any decision. So you have to draw that balance  
22          between notice that is adequate.

23          THE COURT: And let me ask, let's assume that I approve  
24          the settlement how -- and, again, that woman has not objected.  
25          She doesn't know anything. The settlement has been approved,

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

31

1 but she is a possible claimant. She can fill out one of these  
2 forms and get her fifty dollars or maybe one hundred fifty  
3 dollars. How would she get notice? She hasn't gotten it until  
4 today. And let's assume I approve the settlement a week or 10  
5 days from now. Is there any way she can get notice if she  
6 hasn't gotten notice thus far?

7 MR. HEROLD: I have to look and see how long the notice  
8 program goes. I don't know whether it is over or it is still  
9 going.

10 The notice program goes until August 10th. So it is  
11 still going. There are still publications out there. The web  
12 site is still up. The toll-free number is still there. You  
13 can't have a perfect notice plan.

14 THE COURT: I am aware of that.

15 MR. HEROLD: But it is best tracked and so we kept the  
16 notice plan going through the end of the period to cover that  
17 woman in that particular situation.

18 Your Honor, that is all I have. If you have any  
19 questions I would be happy to address them.

20 THE COURT: No. Let's hear from Mr. Nevares.

21 MR. SALAS: Your Honor, may I address the Court for a  
22 couple of matters.

23 THE COURT: Yes.

24 MR. SALAS: Camilo Salas, and I was originally  
25 cocounsel with Mr. Nevares representing Alma Simonet, the

1 original plaintiff in the suit that was filed here; and,  
2 subsequently by way of the preliminary approval order appointed  
3 by the Court as counsel for the consumer class.

4 Your Honor, I just wanted to touch on two matters that  
5 I might be in a better position to discuss with the Court.

6 One is with respect to the history of this case.  
7 Mr. Nevares and I investigated this case beginning in 2005 when  
8 there were reports of seizure by the governmental authorities  
9 here in Panama of the Paxil tablets that were --

10 THE COURT: We are not in Panama.

11 MR. SALAS: We are in Puerto Rico, excuse me. That we  
12 are here in Puerto Rico in the manufacturing facilities. We  
13 spent a lot of time obtaining the governmental records to learn  
14 more about the case. And, subsequently, in April of '06 after  
15 doing a lot of discovery, not formal discovery, but informal  
16 discovery we went ahead and filed the suit.

17 When we filed the suit GSK filed initially one motion  
18 to dismiss. The case was not in front of Your Honor at the  
19 time. It was in front of another judge. And when Your Honor  
20 became a full judge the case was transferred to you. When we  
21 amended our complaint, then the defendants filed another motion  
22 to dismiss, which Your Honor took under advisement. And, as a  
23 result of which, Your Honor wrote a very lengthy opinion which,  
24 quite honestly, has become very informative to us in other  
25 cases because it basically discusses the law of Puerto Rico and



1 what are the types of claims that can be brought in this  
2 jurisdiction in similar cases.

3           Once Your Honor ruled in our favor there Your Honor set  
4 a meeting with the magistrate judge to select the trial date  
5 and discovery deadlines. And following a meeting with the  
6 magistrate judge which GSK argued that discovery should be  
7 limited only to class certification issues, and what we argued  
8 was that discovery should include all issues. It was then that  
9 they relented when we were about to start full discovery here  
10 in Puerto Rico. We started settlement negotiations with GSK.

11           And that brings me to the second point, which is that  
12 at that point without counsel for the third-party payors; and  
13 at that time we did not represent any third-party payors, and  
14 third-party payors were not part of this case. I began  
15 negotiations directly with GSK and traveled to Philadelphia and  
16 met with them. Subsequently, Mr. Nevares joined me in at least  
17 one meeting in Philadelphia where we discussed settlement. And  
18 subsequent to that there were several other meetings which  
19 lasted -- that went on for a period of one year until a  
20 settlement was finally reached.

21           During those meetings I represented the consumer class.  
22 I argued on their behalf and I advocated on their behalf. So  
23 the allegations that have been made here that the consumer  
24 class has not been properly represented because there has been  
25 represented by lawyers who also represented third-party payors

1 is simply not true. I have never represented third-party  
2 payors. I represented the consumer class. I represented them  
3 very well together with Mr. Nevares in all of those  
4 negotiations.

5 And finally, Judge, just one thing I want to call to  
6 Your Honor's attention.

7 THE COURT: Let me just -- you are representing the  
8 consumer class.

9 MR. SALAS: Yes, I have been appointed by the Court to  
10 represent the consumer class.

11 THE COURT: Can you refresh my recollection as to who  
12 represents the third-party payors.

13 MR. SALAS: Mr. Brian Strange was appointed by the  
14 Court to represent the third-party payors.

15 THE COURT: I just wanted to get that clear for the  
16 record. Okay.

17 MR. SALAS: Even today, as we sit here today, we are  
18 together in that we represent the whole class, but we have our  
19 specific instructions, if you would, to represent those  
20 specific classes, and I think we have done that very well. And  
21 we have advocated for the subclasses that we really represent.

22 Your Honor, the other item was something that you just  
23 asked a little while ago. I think it is clear now, but you  
24 asked whether or not notice of this hearing would have been  
25 given or will be known to certain individuals.

1 Just I call the Court's attention to paragraph 25 of  
2 the original approval order where you indicated that the date  
3 of the final approval hearing could be changed without further  
4 notice other than which may be posted at the Court, at the  
5 Court's web site and/or at the web site established under the  
6 notice plan.

7 So basically there was notice there given that any  
8 changes in the scheduling could be subject, could take place  
9 and would be posted in the Court's own web site or whatever the  
10 Court does. That is all I have, Your Honor. Thank you.

11 THE COURT: Before I hear from Mr. Nevares, one last  
12 thing, would there be any objection, and assuming that I  
13 approve the settlement, if, for example, in the -- not only  
14 the -- well, because in the web site for the settlement, for  
15 example, I allow 10 more working -- until August 10th, for  
16 example, to file any other objections; and that appears  
17 specifically, would there be any objection as to something like  
18 that? That really doesn't change the nature of anything, but  
19 it gives that little extra added window of opportunity to  
20 anybody else who, you know, who specifically appeared on the  
21 site. And that is something that whoever is in charge of the  
22 site could probably change right now. Would there be any  
23 objection as to that?

24 MR. SALAS: Your Honor, would that be additional time  
25 to file additional objections or to file claims?

1 THE COURT: Objections.

2 MR. HEROLD: Your Honor, GSK would object to that.

3 There has been quite a long time to file objections in this  
4 case. The original deadline was out there for quite a long  
5 time. The Court extended it, and I just checked. The  
6 settlement web site was updated to show the hearing date here.

7 THE COURT: Today.

8 MR. HEROLD: Yes, it took a little while. I believe it  
9 was done on July 17th. It was updated, but it was updated. As  
10 Mr. Salas just stated, it's the original notice.

11 THE COURT: You gave me that date. I was under the  
12 impression. Because today is the 27th. I just wanted to make  
13 sure that it wasn't changed, for example, the 25th.

14 MR. HEROLD: No.

15 THE COURT: Or last Friday.

16 MR. HEROLD: It was changed. It took a while to get it  
17 on the web site. But the problem is, Your Honor, today is the  
18 fairness hearing. I think technically if the objection period  
19 is extended --

20 THE COURT: We would have to have another fairness  
21 hearing.

22 MR. SALAS: And another notice.

23 MR. HEROLD: And there has been plenty of time to  
24 object, Your Honor, as demonstrated by the fact that a number  
25 of the objectors are here and the types of objections you see

1 here are -- I would be surprised if there are additional ones  
2 that somebody comes up with. They pretty much cover the  
3 gambit. The Court has been fair with respect to allowing  
4 objections and extending the deadline.

5 THE COURT: Let me also ask something else that is  
6 related. When was the deadline for opting out of any class?

7 MR. HEROLD: I believe that was July --

8 MR. SALAS: 1st.

9 MR. HEROLD: Second, was it?

10 THE COURT: I believe no one has opted out of the  
11 class.

12 MR. HEROLD: There were a few opt outs, Your Honor, but  
13 very few.

14 THE COURT: Those haven't been filed with the Court.

15 MR. HEROLD: No.

16 THE COURT: Do you know how many? 10, 15 or 20?

17 MR. HEROLD: We could find that out, Your Honor.

18 MR. STRANGE: I think it is stated in our motion, Your  
19 Honor, at the time we filed our motion for final approval I  
20 think we stated the number of consumer opt outs.

21 THE COURT: And none of those opt outs are represented  
22 by any of the counsel who are objecting here today.

23 MR. HEROLD: No, Your Honor, I believe if a consumer  
24 changes to opt out they also give up the right to object  
25 because they are not a part of this.

1 THE COURT: Perhaps somebody who opted out is  
2 represented by attorney Z and attorney Z is representing  
3 somebody else who objected. I assume none of the counsel are  
4 the same for objectors or people who are opting out.

5 MR. HEROLD: Not to my knowledge, Your Honor.

6 MR. SALAS: Their claims will not be extinguished by  
7 the settlement, Judge, once they object.

8 THE COURT: Any opt out they can't ask for the fifty  
9 dollars or the one hundred fifty dollars. They can sue and  
10 they can go to any state and --

11 MR. SALAS: And sue, yes.

12 MR. STRANGE: Your Honor, the opt out deadline was  
13 actually May 15th.

14 THE COURT: Okay. So that passed a long time ago.

15 MR. STRANGE: Yeah, and there was one request from a  
16 consumer to opt out at that point.

17 THE COURT: Okay. So only one opt out in a timely  
18 manner/

19 MR. STRANGE: For a consumer, yes, Your Honor.

20 MR. SALAS: Thank you, Your Honor.

21 THE COURT: Mr. Nevares.

22 MR. NEVARES: Good afternoon, Your Honor. My name is  
23 John Nevares and I represent plaintiffs' class counsel. Let me  
24 start by saying -- by addressing an objection that has been  
25 raised by Sweeney, PAL and Weinstein, which is -- which

1 involves the attorneys' fees. These objectors cite two cases  
2 in support of the fact that the attorneys' fees awarded to  
3 counsel for the class should come out of the amount of claims  
4 actually logged in with the claims administrator that we have,  
5 you know, as part of the process.

6 The problem that these objectors have is that they  
7 mislead the Court when they cite *In Re: T.J. Companies Retail*  
8 *Security*, a case from the District of Massachusetts from 2008.  
9 You can find that 584 Fed. Sup. 2nd, 395. And they also cite  
10 Strong vs. Bell South Communications Inc., 173, FRD, 167, from  
11 1997.

12 Those two cases are inapplicable to our case.

13 THE COURT: Actually, in that *Strong* case there is a  
14 circuit citation, 137, F.3rd, 844, 5th Circuit.

15 MR. NEVARES: What I am trying to convey to the Court  
16 is the following: This case is totally different from the  
17 factual scenario both in Strong and in *TJX*. And I shall  
18 explain to you why.

19 In this case we were able to get a common benefit fund  
20 of twenty-eight million dollars in cash for the claimants, for  
21 the class. In *TJX*, for example, that was a case about the  
22 hacking into a computer system and getting the credit card  
23 information of about 45,000 persons. In that case there was no  
24 common fund. And counsel used the low-start method.

25 But to make things worse, both in *TJX* and in the *Strong*

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

40

1 case that I just cited, the benefit to the class were credits,  
2 benefits other than cash. In our case the benefit to the class  
3 is the recovery of what they paid for Paxil CR during the  
4 period 2002 to 2005.

5 So that is why you will see when the Court writes the  
6 TJX opinion saying that this 175 million fund is illusory. And  
7 you will see that when they write about *Strong* and their  
8 sixty-four million dollars in credits. This was a case  
9 involving Bell South and the fact that they charged the people  
10 that used telephones and certain amounts in excess of what they  
11 should have charged. And what they offered was a fund of  
12 sixty-four million in credits. And that has been referred to  
13 in other cases as a phantom because the money is not there for  
14 the claimant to have the incentive to go to the claims  
15 administrator and collect money.

16 Here we have twenty-eight million dollars in cash for  
17 this consumer class to access and get reimbursed.

18 So the judge in the *TJX* case was preoccupied with the  
19 fact that he was being presented a settlement that was not fair  
20 and reasonable. And that is why you see him write, go to great  
21 lengths to write about maybe in such a situation where the  
22 settlement is not fair and reasonable we should adopt the  
23 number of claims that are logged in in the settlement. And  
24 depending on the number of claims that are logged in, then we  
25 apply a percentage to compensate attorneys.

YVETTE RICHARDSON, CSR, RPR, CCR



1           That is simply not the case before us. In the case  
2           before us we worked very hard. And one thing counsel, my  
3           brother counsel, forgot to say is that I spent four months  
4           traveling the island from east to west and north to south to  
5           find ex-employees of GlaxoSmithKline to find out facts about  
6           their production of Paxil CR at the Cidra plant. And that took  
7           most of my time, including Saturdays and Sundays until I  
8           interviewed somewhere between 20 and 30 ex-employees of  
9           GlaxoSmithKline. And that was a very important aspect of this  
10          case in that the defendant was not comfortable with the fact  
11          that I was doing discovery, finding out information about their  
12          practices in that plant in Cidra which was eventually shut down  
13          and that also brought us to settlement.

14          Now, again, not to repeat myself, but when you hear the  
15          objectors come in and cite to you these two cases the TJX  
16          Companies Retail Security case and the *Strong/Bellsouth*  
17          *Telecommunications*, you have to understand that these are two  
18          settlements with which the Court was not happy because they  
19          were not reasonable and they were not fair. Those cases have  
20          been cited thereafter by circuit courts, because these are  
21          district court cases, and they also repeat the same theme, that  
22          the *Strong* and *TJX* cases were cases that were phantoms because  
23          they were offering things that were not money. They were  
24          offering credits, you know, and other things that we are not  
25          offering here. Here we are offering cash refunds. Strictly

1 cash refunds in a common benefit fund of twenty-eight million  
2 dollars.

3 So I want you to, you know, I want to start off by  
4 distinguishing these two cases from the line of cases that I am  
5 going to argue to you now that sets the stage, sets what the  
6 rule is in these class action cases in terms of awarding  
7 attorneys' fees. And that starts with the very well-known  
8 seminal case of *Boeing vs. Van Gamber*, 444 U.S., 472, 1980.  
9 In that case the Supreme Court -- the United States Supreme  
10 Court held that the attorney's fees are calculated on the  
11 entire fund created and not on claims made against the fund.

12 The Court is very clear and precise in its language.  
13 And that is the rule that has become the common fund doctrine,  
14 which is what we seek the Court to apply here.

15 If you see, for example, the case of *Williams vs.* -- I  
16 think I missed a case. If you see a very enlightening case  
17 also on the common fund doctrine when awarding attorney's fees  
18 in class actions it would be *Waters vs. International Precious*  
19 *Metals Corporation* 190 F.3d, 1291. That is a case out of the  
20 11th Circuit which holds one thing that is noteworthy. It  
21 holds that no case has held that district court must considers  
22 only actual payout, which is what these objectors are trying  
23 the Court to do.

24 THE COURT: Let me ask something, when you say they are  
25 asking for actual payout, my impression is that what the

1 objection is is that the attorneys not receive the 30 percent  
2 attorneys' fees. Are the objectors requesting they only  
3 receive the value of their services or what exactly?

4 MR. NEVARES: These objectors that I just mentioned,  
5 Sweeney, Weinstein and PAL are relying on those two cases I  
6 just cited to you, *TJX* and *Strong*, for the proposition that we,  
7 as class counsel, should collect only from those claims that  
8 are actually made. Not from the fund of 28 million dollars.  
9 That is one of their objections. And that is why I am trying  
10 to explain to you that that is not -- that those two cases are  
11 clearly distinguishable from the case at bar for many -- for  
12 all the reasons that I have already set forth.

13 What I am doing now is taking you to the standard that  
14 is -- that the majority of the circuits apply, which is Common  
15 Fund Doctrine or Loadstar.

16 However, if you bear with me I will take you through  
17 the case law so you will see how the Loadstar is being used by  
18 the courts, the circuit courts. The majority of the circuits  
19 are going under the Common Fund Doctrine and they are using the  
20 Loadstar as a collateral source to check and see whether the  
21 multiplier of the Loadstar is fair enough in order to warrant  
22 the award of attorneys' fees sought by the class counsel. In  
23 this case, as you know, we are seeking 8,741,329.19. If you  
24 deduct the costs, which is \$159,953.90, you are left with  
25 attorney fees approval sought in the amount of 8,581,375 --

1 THE COURT: 8.5 approximately.

2 MR. NEVARES: 8.5 which is 30.65 percent from the  
3 common fund. But I was going to get there in terms of  
4 justifying the fairness and the reasonableness of the  
5 percentage sought. But before I do that, I want to emphasize  
6 to the Court that the Common Fund Doctrine is the methodology  
7 that is being applied by the circuit courts, which is a  
8 percentage approved by the Court against the entire fund.

9 And that is what we are -- that is what our papers say  
10 and that is what I just -- those numbers that I gave you are  
11 the -- what we are seeking as compensation and the percentage.

12 Very enlightening to prove and to justify our fees is  
13 the opinion by Professor Miller who has worked on class action  
14 settlements for years and has made an analysis of this case,  
15 which is attached as an exhibit.

16 It is the declaration of Professor Jeffrey Miller. He  
17 has spent years opining on class certification and preparing  
18 databases. He has reviewed over 1200 cases to come up with one  
19 of his opinions. This opinion by Professor Miller basically  
20 justifies the amount of attorneys' fees that we seek.

21 If you go to page five he says that the Loadstar  
22 multiplier in this case is 2.03. And then says that that is on  
23 the low end of all the Loadstar multipliers that he has studied  
24 throughout the years from his databases. Most of the  
25 multipliers are upwards of three, four, and even five.

1           He also justifies the 30.65 percent because he has made  
2       studies that appear in page 8 and page 9 of his opinion where  
3       he sets forth the percentages. If you look at page 8, for  
4       example, he says, "average attorneys' fee as percentage of  
5       settlement it goes into 31 -- 30, 31, 32. And these are all  
6       class actions. All these tables deal with class actions. And  
7       he also opines that the Common Fund Doctrine is the superior  
8       method of calculating the attorney's fees that should be  
9       awarded to class counsel.

10           In his opinion, he says that the Loadstar approach has  
11       become disfavored over time because of a number of significant  
12       drawbacks relative to the percentage approach. Among other  
13       shortcomings he says is the Loadstar approach is burdensome to  
14       apply, creates perverse incentives for class counsel to  
15       protract the litigation, and fails to align the interests of  
16       counsel with also the class. And then he finally says, the  
17       methodology of Common Fund Doctrine is a superior method for  
18       validating the reasonableness of class counsel fees.

19           However, he does mention that it is a good idea to do  
20       the Loadstar cross-check. And if you look at page 12 you will  
21       see that a sampling of Loadstar multipliers go from 9.3 down to  
22       4.4 and we are at 2.003 in this case. So it is more than  
23       reasonable what we seek as a Loadstar cross-check or a Loadstar  
24       multiplier if the Court wishes to use that as a cross-check.

25           Now, going back to my argument on the case law, I want

1 to make it abundantly clear how -- why I say that the Common  
2 Fund Doctrine is the law of the land these days, and I don't  
3 say it. I mean, it started -- if you go back to 1882 you will  
4 find case law that already recognizes this kind of approach.  
5 But, really, the seminal case is *Boeing vs. Van Gamber*, which  
6 I already cited. But I want to take you through a couple of  
7 cases that are also very important following *Boeing*. I was in  
8 *Waters vs. International Precious Metals*, 190 F.3d., 1291 from  
9 the 11th Circuit. Again, that case distinguishes *Strong* cases  
10 cited by objectors at page 6 because there was no fund in  
11 *Strong*, to start with, over and above the other things that I  
12 already mentioned.

13 And also states -- the 11th Circuit also states, again,  
14 I think I said this before, that no case has held that the  
15 district court must consider only actual payout.

16 Then, I want to take you to *Williams vs. MGM Path*  
17 *Communications Company* where *Boeing* is followed. And there the  
18 9th Circuit held that it was an error to base attorneys' fees  
19 on claims against the fund, rather the entire fund or Loadstar  
20 where the options given by the 9th Circuit in this case.

21 Another point that I want to bring up that this case  
22 discusses, 129 F.3d, 1026, is what happens to the monies that  
23 are not claimed. Well, this case recognizes that it is that  
24 those monies can be returned in this case to GSK for those  
25 claimants that didn't claim out of the 28-million-dollar pot.

1           To that effect, at page 1027, the Court citing *Boeing*  
2       states that as follows: The Court concluded that the attorneys  
3       for successful class may recover a fee based on the entire  
4       common fund created for the class even if some members make no  
5       claims against the fund so that money remains in it that  
6       otherwise would be returned to the defendants.

7           So I think that the argument that, you know, that money  
8       cannot be returned to the defendant fails if one reads *Williams*  
9       *vs. MGM Path Communications*.

10          THE COURT: So even, the argument, let's assume that  
11       the only person who files the form is Ms. Simonet, the  
12       settlement is approved. Then it is the same as if 300 persons  
13       had filed under that case law.

14          MR. NEVARES: Yes, because what the Courts look at is  
15       the work put in by the attorneys to reach the common fund. And  
16       as you have heard here, we have gone to great lengths to reach  
17       this settlement and that is the emphasis the Court makes when  
18       evaluating the award of attorneys' fees for reasonableness.

19          THE COURT: Let me ask, for instance, you mentioned the  
20       Loadstar. There is some very recent case law. This case I  
21       have before me, the highest that I have seen lately in the  
22       attorneys' fees award. I will give you the name of the case  
23       under the Loadstar -- I will explain to you why I am making  
24       reference to this -- it is in civil case 03-2317, Perez  
25       Gimenez, P.G. It is Guillemard *vs. Contreras* case. That is a

1 civil rights case. One plaintiff vs. one defendant in personal  
2 and official capacity. It is three plaintiffs, but the  
3 plaintiff's company, the plaintiff's wife, vs. one defendant or  
4 the personal capacity under 1983 and then the Commonwealth or  
5 the same party in the official capacity for injunctive relief  
6 purposes.

7 That case went to trial. Went up on appeal and  
8 interlocutory. And attorneys' fees under the Loadstar. And  
9 again, it was complex I think because -- it wasn't complex, but  
10 it was protracted litigation because I think the defense  
11 litigated this case very highly. But the total attorneys' fees  
12 awarded in that case were 1,525,000 -- no, about one million  
13 and a half. And that is a simple political discrimination case  
14 that took some time to be tried.

15 What I would like to ask, just to get an idea, because  
16 this is a compared to -- if this case went to trial, if this  
17 type of case went to trial -- that case went to trial, if this  
18 case were to go to trial, I assume that even under Loadstar  
19 conceivably and let's assume it goes to trial, gets appealed  
20 and is affirmed on appeal, but with all the attorneys' fees it  
21 is not unreasonable, and this is obviously a case where you are  
22 going to need more than this political discrimination case.  
23 There were three attorneys working for the plaintiffs and they  
24 were approved by the Court. Assuming if this case were to go  
25 to court GlaxoSmithKline would not only have counsel here



06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

49

1 present, but would have two or three attorneys; am I correct?

2 It would be a litigation.

3 MR. HEROLD: I'm afraid you're right, Your Honor.

4 THE COURT: And you would have your appellate attorney

5 also sitting in the back row. I would assume we would have

6 here Mr. Nevares, Mr. Strange and Mr. Salas and, perhaps, one

7 or two other counsel. But if this case were to go to trial,

8 and I assume this with all the causation and all the experts,

9 probably we would have a couple of Daubert hearings; but if

10 this case were to go to trial, I think at least from the -- if

11 plaintiffs were to prevail, and obviously, this is not 1983.

12 So it is not automatic attorneys' fees, but based on if we look

13 at the Loadstar, and if the attorneys' fees were available, I

14 would assume we are talking about maybe in the neighborhood of

15 anywhere within a reasonableness from anywhere from three to

16 6.5. It could be 7 million dollars in attorneys' fees because

17 of the class issue. Of course, we would have to have the Court

18 certify the class if that got litigated. We could be here in

19 this case maybe six years or five years easily. Even though on

20 rocket docket this would not be -- as the motion to dismiss,

21 the Court's ruling in this case denying the motion to dismiss

22 in part and granting in part, it is not a simple case.

23 I would assume, and based on my experience, this is a

24 case that could generate, again, anywhere from three to six,

25 maybe even more, million dollars. And some of the rates I will

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

50

1 just quote briefly from the Guillemard case. But, for example,  
2 and actually that case mentions Mr. Nevares because he has  
3 tried other cases here. So let me just for example cite  
4 Mr. Nevares' -- this is at page 11 of docket 556. This is  
5 amended order awarding attorneys fees. It is a very thorough  
6 opinion. It rates attorneys' rates throughout the years, but  
7 for example, this is a case called Sueiro Vazquez where  
8 attorney Nevares worked.

9 MR. NEVARES: I remember that case.

10 THE COURT: In that case Mr. Nevares, based on his  
11 experience, and he has been an attorney since approximately  
12 1980, it is almost 30 years of experience, but he was awarded,  
13 this was maybe three or four years ago, maybe even more, 265  
14 for out-of-court work, 285 for in-court work. So I would  
15 assume that -- when was that case, Mr. Nevares, do you  
16 remember?

17 MR. NEVARES: Yes, I remember that case very well.  
18 That involved the Historic Preservation Society and I  
19 represented two public officials that had been dismissed for  
20 political reasons.

21 THE COURT: When was that? One was in 2001/2002.

22 MR. NEVARES: I believe it was -- I mean, I have tried  
23 so many case it is hard to pin it down. But I believe it was  
24 sometime in 2002, or 2003 that we actually tried the case  
25 before Judge Garcia. And it was appealed.

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

51

1 THE COURT: Let's assume Mr. Nevares' rates for Puerto  
2 Rico, 300 now and 320 or 325 for in-court now. Mr. Salas, you  
3 appeared before me. I assume you are basically in that same  
4 boat.

5 MR. SALAS: Actually Judge, we are a little bit higher.  
6 Our rent is higher down in New Orleans.

7 THE COURT: But you have been practicing for the same  
8 time as Mr. John Nevares, Mr. Salas. The Court knows. We have  
9 done a lot of cases together.

10 Since you are out of state that might be justified and  
11 I believe -- Mr. Strange, how many years of experience do you  
12 have?

13 MR. STRANGE: I have been practicing since 1981 also.

14 THE COURT: All of you have approximately 30 years  
15 approximately. But out-of-court counsel -- out-of-state  
16 counsel would probably be awarded a higher award. I am not in  
17 agreement with that, but I think it discriminates against local  
18 counsel, but I think sometimes you need out-of-state counsel as  
19 well, and usually the rates are going to be higher as happened  
20 in the Guillemard case. The counsel from Massachusetts was  
21 awarded a higher rate.

22 This is a case that would take three or four counsel on  
23 plaintiff's side. And that case, again, if we would have to  
24 have the class action, I am sure there would be the class  
25 action hearing. There would be numerous, I would say, I would

YVETTE RICHARDSON, CSR, RPR, CCR

1 use the word Solomon Grundy of discovery issues before  
2 magistrate judges and myself. Then there is a Rule 56 stage of  
3 the case. And I am sure summary judgment motions would  
4 probably be, if I would pile them up, the plaintiffs and the  
5 defendants, they would probably be with the exhibits taller  
6 than me. Probably taller than Yao Ming so we would have a lot  
7 of exhibits.

8 If that would be the case, summary judgment, assuming  
9 the case would go to trial, you can give me a rough estimate,  
10 two or three months.

11 MR. NEVARES: Easily.

12 THE COURT: Counsel, if you are going to object you may  
13 say it won't take that long. Assuming the case went all the  
14 way. So under a Loadstar -- again, this is just an  
15 approximation, because hopefully, as I hope, I don't have to  
16 try this case. If there are any objectors in Puerto Rico I  
17 hope they end up somewhere else except in the courtroom. With  
18 one single plaintiff this could take a long time to get tried.

19 With the Daubert hearings which would probably be as  
20 lengthy as the trial. They could be dispositive, but if the  
21 Court were to rule in plaintiff's favor and, again, there may  
22 be cross Daubert hearings. I am sure the plaintiffs would try  
23 to strike the defense experts and vice versa.

24 So, again, this is a case that conceivably we could  
25 have three million dollars in attorneys' fees. Under Loadstar

1 it could be five million. It could be six. It would all  
2 depend. But, again, within the range or the realm of  
3 reasonableness it could be within that range. I just wanted to  
4 note that.

5 Okay. Mr. Nevares, you may continue.

6 MR. NEVARES: Yes, continuing, I couldn't agree with  
7 you more in terms of your exposition, Your Honor.

8 THE COURT: Again, I base that based on I was a  
9 magistrate judge for five years and a district court judge for  
10 three years now, almost three years and about a week. That is  
11 my professional estimate of what this litigation could cost in  
12 Loadstar. And I assume counsel for Glaxo, if you were to bill  
13 your clients, it is very -- we know from that perspective this  
14 could probably cost somewhere in that ballpark of attorneys'  
15 fees as well. Am I correct?

16 MR. HEROLD: I'm afraid to answer, but I think you are  
17 correct, Your Honor, at least.

18 THE COURT: And then, of course, you could have other  
19 fee arrangements. Let's assume a different law firm were to  
20 try this or handle this. It could run up to that range, a  
21 similar class action.

22 Let's continue, Mr. Nevares.

23 MR. NEVARES: I want to cite to you a case that where I  
24 was counsel in my early days. It was the Dupont fire class  
25 action. In that case there were opinions issued by the 1st

1 Circuit Court of Appeals pertaining to attorneys' fees. I am  
2 referring to 56 F.3d, 295. And noteworthy is the fact that the  
3 1st Circuit stated that and I cite, temporary to -- and this is  
4 a 1995 case, contrary to popular belief it is the Loadstar  
5 method, not the POF method that breaks from precedent.  
6 Traditionally counsel fees in common fund cases were computed  
7 as a percentage of the fund subject, of course, to  
8 consideration of reasonableness. And it cites a case from the  
9 United States Supreme Court, *Central Railroad and Banking*  
10 *Company vs. Pettus*, 113 U.S. 116, at page 127 and 128 from  
11 1885. That is why I mentioned earlier that this doctrine goes  
12 back to the 19th Century. It is basically written, as you say,  
13 Your Honor, in New Hampshire granite.

14 Let me turn to other issues that have been raised  
15 because I think I made my point as to what methodology  
16 computing attorneys fees should be. There are other cases I  
17 can cite to you from other circuits or if you wish I can  
18 discuss those with you.

19 THE COURT: It is not necessary. And let me say this,  
20 this might save time for everybody and objecting counsel may  
21 argue otherwise. But, again, I understand that even if we were  
22 to use the Loadstar fee, the attorney fee here is not, per se,  
23 unreasonable had this case proceeded all the way. That's my  
24 finding, based on my experience.

25 So, again, that may save everybody some time. You may

1     argue that I am wrong. I am sure Mr. Nevares is not going to  
2     argue that. I am sure Mr. Nevares is not going to argue that.  
3     My feeling is I may disagree and perhaps I may say it should be  
4     7 million rather than 8.5, but, again, it is not outside the  
5     range of reasonableness of the Court's experience had this case  
6     gone all the way and applied the Loadstar method.

7             MR. NEVARES: I also want to point out, one of the  
8     objectors cites the case of Weinberger vs. Great Northerner,  
9     925 F.2nd at 518 from the 1st Circuit in support of his  
10    position that there has to be an itemization of all the tasks  
11    performed by counsel. The problem Mr. Weinstein has is that  
12    case is not applicable to the case at bar. That case involved  
13    attorneys fees, to the attorneys' fees made in conjunction with  
14    voluntary discontinuance of a class action suit under  
15    circumstances where there was no common fund. And fees were to  
16    be paid out of a clear sailing agreement. So that case is  
17    simply again, just like *Strong* and *TJX*, not applicable to the  
18    case at bar because of the circumstances that I just pointed  
19    out.

20            Your Honor had discussed hourly rates. I had case law  
21    on hourly rates on *Love vs. Mayo* on Sunday, Westlaw 2709975  
22    from 2007 the Court approves hourly rates in a class action  
23    suit between 305 and 690 dollars and 245 dollars for  
24    paralegals. If you look at *In Re: Priceline* 2007, Westlaw  
25    2111592, The award of attorneys' fees totals 30 percent of an

1 80 million settlement and approves the Loadstar cross-check.

2 And the hourly rate there is a range from 50 dollars to 770

3 dollars per hour. Do you have any questions, Your Honor?

4 THE COURT: I don't have any questions. Again, the

5 Loadstar here for Puerto Rico, Mr. Nevares, you are one of the

6 highest attorneys in this Court, based on your experience and

7 the civil rights case and litigation. I am talking three or

8 four years ago you were 285 in court and 265. So you are

9 probably, again, 300 or 325 in court, 300 out of court. And

10 out-of-state attorneys, they would be making at least that much

11 or maybe a little bit more in their respective jurisdictions.

12 But even if we apply it within Puerto Rico you are all within

13 that range.

14 I would have to know, Mr. Strange, obviously for this

15 type of class action litigation, particularly for the

16 procedural and the other very technical matters, he is very

17 experienced also, and that could weigh out because of his

18 expertise. I don't think anybody here in Puerto Rico in all

19 these class action cases there are usually counsel from

20 outside. So he would probably be compensated more.

21 So, again, my finding is based on the Loadstar, it is

22 within the range of reasonableness.

23 MR. NEVARES: Anything further, Your Honor?

24 THE COURT: Nothing further.

25 MR. NEVARES: Thank you, Your Honor, for your time.



06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

57

1           Let me hear from counsel for GSK, if there is anything  
2   you wish to add. If not, I will start hearing from objecting  
3   counsel.

4           MR. HEROLD: No, Your Honor. GSK has agreed not to  
5   object to the request.

6           THE COURT: Okay.

7           Let me ask one additional thing before I hear the  
8   objections and either side and then the objectors can also  
9   address this. I know there is the cy pres issue here. C-Y,  
10   separate word, P-R-E-S, and that means that whatever funds are  
11   not collected or presented funds that are not collected go to a  
12   nonprofit that deals with the issue.

13           My question is just to get it on the record, let's  
14   assume only Ms. Simonet fills out the form. Attorneys collect  
15   their 8.5 million. There is still 20 million there left in the  
16   pot. Do those 20 million -- are those 20 million under the cy  
17   pres doctrine or is it just a percentage?

18           MR. STRANGE: Your Honor, Brian Strange for the record.  
19   The way the settlement works, with respect to the third-party  
20   payors there is 11.2 million dollars in cash. That money is  
21   distributed pro rata to the third-party payors.

22           THE COURT: You know who those are.

23           MR. STRANGE: We know who those are.

24           THE COURT: There is no reversion.

25           MR. STRANGE: There is no reversion.

YVETTE RICHARDSON, CSR, RPR, CCR

1 THE COURT: So that means there is 8,000 -- I mean,  
2 eight million or nine million dollars for the individual  
3 claimants.

4 MR. STRANGE: For the third-party payors, yes, and then  
5 there is 16.8 allocated for the consumers. And after the  
6 subtraction of the notice, cost, administration and the  
7 attorneys' fees the amount of consumer claims are paid and  
8 there won't be any money left over because that is a  
9 claims-made policy. GSK has agreed to pay up to 16.8 million  
10 for the consumers plus the percentage of the notice,  
11 administration and attorneys' fees.

12 THE COURT: But only if Ms. Simonet requests her 50  
13 dollars or her 150 dollars, would that whole money go to the cy  
14 pres or what happens.

15 MR. STRANGE: With respect to the 16.8 million normally  
16 a cy pres would work if there is a cash, you know, if there is  
17 16.8 million, and not that many people claim there is an amount  
18 of money that could go to a charity under one version of a  
19 settlement. This version is it goes back to GSK. GSK is not  
20 going to get 16.8 million. Assuming Your Honor approves the  
21 attorneys' fees, let's say for example, it is 8.5 million, 60  
22 percent of that comes out of the 16.8. So that is,  
23 approximately, you know whatever, five million. Then costs of  
24 notice comes out of that. Six percent of the cost of the  
25 notice and the administration come out of that. So even if

1     only a few people claimed then instead of spending 16.8  
2     million, GSK would spend, you know, would take 6.8 million.

3             THE COURT: Let me ask, there is a consumer class and  
4     then there is third-party payor. Let's assume the attorneys'  
5     fees are 8.5 million, would that mean that half of those  
6     attorneys fees come from one group, the other half from the  
7     third party or the other half from consumers or how is that?

8             MR. STRANGE: That is divided 40 percent to the  
9     third-party payors and 60 percent to the consumers because the  
10    28 million is divided 60 percent to the consumers and 40  
11    percent.

12            THE COURT: So the actual amount that could be reverted  
13    to GSK could be approximately 10 or 11 million.

14            MR. STRANGE: Yes, it could be around that amount.

15            MR. HEROLD: Your Honor, just tipping the point even  
16    sharper. It is really not a reversion. A reversion incurs  
17    where if we put aside the third-party payor for a second. On  
18    the consumer side, it would be a reversion deal if 16.8 million  
19    was actually put in an escrow account. And then the money came  
20    out to pay attorneys' fees, administrative costs and claims and  
21    the GSK would get what's left.

22            The way this settlement is structured it is the same  
23    way the Hormon settlement was structured. GSK has agreed to  
24    pay up to 16.8 million for the consumer side, but it doesn't  
25    actually pay it unless --

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

60

1 THE COURT: Unless it is requested.

2 MR. HEROLD: If it is not --

3 THE COURT: If it is not requested then GSK.

4 MR. HEROLD: Just doesn't pay it.

5 THE COURT: Just doesn't pay it.

6 MR. HEROLD: Exactly. So this notion of a cy pres  
7 would change considerably and require GSK to take money out of  
8 its pocket, it doesn't anticipate having to pay unless the  
9 amount of consumer claims are much higher than we think it will  
10 be, and putting it in some charity. There was some confusion  
11 in the papers about that, Your Honor, so I wanted to straighten  
12 that out.

13 THE COURT: I wanted it to be clear that there is no cy  
14 pres here. The money is in GSK's hands unless X number of  
15 claimants claim it and that is where it leaves.

16 MR. HEROLD: Correct, Your Honor.

17 THE COURT: For the consumer, because for third-party  
18 claimants, they are going to get it.

19 MR. HEROLD: Correct.

20 THE COURT: Okay. Now I am going to hear from the  
21 objectors. Let me just see a showing of hands from the  
22 objectors. What objectors are here for the consumers and which  
23 are here for third-party payors.

24 MR. WEINSTEIN: Your Honor, Jeff Weinstein on behalf of  
25 Clay Bain, and he is a consumer.

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

61

1 MR. WILKINSON: Actually, Your Honor, Wells Wilkinson  
2 for PAL. We did raise issues that are relevant to the third-  
3 party payors subclass in the settlement. We acknowledge that  
4 we do not have standing in that we are not here on behalf of  
5 one of those third-party payors, but we do feel that under  
6 existing law the Court can certainly consider all our comments.  
7 We would like to share them with you even if another party  
8 here, a class member, is not present. We would be happy to  
9 describe it.

10 THE COURT: There is nobody here for a third-party  
11 payor. Of the other objectors that are in writing, it is all  
12 class. Class members.

13 MR. WEINSTEIN: Consumer class only.

14 THE COURT: What I would like to do also, I am going to  
15 hear from the objectors, but if one objector raises a point I  
16 would appreciate it if the next objector, if someone has said  
17 that before just say that I join. What is good for the goose  
18 is good for the gander. Whatever he says will benefit everyone  
19 else. Just say you incorporate any of the other comments and  
20 just add anything that is original that hasn't been raised  
21 before, and that way we will save everybody time.

22 So, Counsel, you may proceed.

23 MR. WEINSTEIN: May it please the Court, Your Honor, I  
24 will be brief. As much as I have enjoyed my stay in Puerto  
25 Rico, I have a flight to catch.

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

62

1 THE COURT: Okay.

2 MR. WEINSTEIN: Thank you very much. My name is Jeff  
3 Weinstein.

4 THE COURT: I assume that is your luggage there.

5 MR. WEINSTEIN: That is Mr. Brown's luggage. My  
6 luggage is back at the hotel.

7 THE COURT: Okay.

8 MR. WEINSTEIN: Thank you very much. Jeff Weinstein,  
9 on behalf of Clay Bain. As I mentioned before, Mr. Brown is  
10 our local counsel. Thank you for allowing me to represent pro  
11 hac vice. I refer the Court to objections to certification,  
12 the settlement the request for attorneys' fees already on file.  
13 That is docket at 130. The Court has just hit the nail on the  
14 head. To consumers this settlement is illusory because there  
15 will not be many consumers that make a claim.

16 So I would like to discuss my comments solely on the  
17 policy reasons why it is in the best interest of consumers that  
18 the Court should base the percentage of the fund of the amount  
19 of attorneys' fees on the amount actually claimed by class  
20 members, not on some hypothetical amount as requested by class  
21 counsel.

22 THE COURT: Let me just ask you one thing, because when  
23 you talk, "class members," that's maybe four million dollars in  
24 attorneys' fees for class members. Because the other four  
25 million are for the third-party payors.

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

63

1 MR. WEINSTEIN: Your Honor, as I understand it, counsel  
2 can probably speak to the numbers more than I. We have a 60/40  
3 split. We have a 60 percent split for consumers.

4 THE COURT: 60 percent for the consumers. We are  
5 talking about the 60 percent for the consumers.

6 MR. WEINSTEIN: So whatever the amount the Court  
7 believes to be a reasonable amount of the attorneys' fees, my  
8 request is that the Court wait until after the claim period  
9 ends on August 10 to see what the take rate is for consumers.

10 So I understand the argument that counsel has made  
11 about a common fund. I am requesting, as a matter of policy,  
12 Your Honor, that what is fair for the class members is that we  
13 wait and see, if the Court wouldn't mind, it is not a very long  
14 period of time, until August the 10th to see how many actual  
15 consumers make claims.

16 THE COURT: And let me just ask, if anybody has a rough  
17 estimate, how many actual consumers have made claims up to now,  
18 if somebody knows. If you have an idea.

19 MR. STRANGE: Your Honor, I think we don't know up to  
20 now. I think up until July 1st, there was 115,000 hits to the  
21 web site, according to the declaration. And I think, I don't  
22 have the exact numbers, but something like requested at that  
23 point 10,000 claims sent out, but I am not positive about that.

24 THE COURT: Okay. And that is not, I assume  
25 Ms. Simonet has filed her claim.

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

64

1 MR. INSERNI: Yes, Your Honor.

2 THE COURT: Please continue.

3 MR. WEINSTEIN: I am not a mathematician.

4 THE COURT: Neither am I.

5 MR. WEINSTEIN: But here we have the defendant, and I  
6 am going to go off my script for just a moment, because I  
7 believe you raise an important point. Here we have the  
8 defendant saying there should be 5,600 claimants, but roughly  
9 we have 10,000 people making claims that have signed an  
10 affidavit swearing they have potentially perjured themselves,  
11 it may not be practical at all for them to have a valid claim.  
12 I think the numbers will speak for themselves as they come in.  
13 But, remember, claimants are signing under oath swearing that  
14 they are telling the truth, under penalty of perjury.

15 Yet if the numbers bear out, as they have been  
16 discussed in this courtroom, it would be impossible for there  
17 to be more than 5,600 claims or something to that order.  
18 Again, I am off script. If the take rate is more than two or  
19 three percent, Your Honor, of the entire country, I will be  
20 surprised.

21 THE COURT: You could have approximately 10,000 by now.  
22 The time they have had, by August 10 it could be up to 20 or 25  
23 at the most. Anywhere between 18,000 and 25, that may be it.  
24 And, again, you never know.

25 MR. WEINSTEIN: I would be very surprised. I would be

YVETTE RICHARDSON, CSR, RPR, CCR



1 willing to place a wager at one of the local casinos that the  
2 take rate would be substantially less than the numbers have  
3 just now been discussed. Probably more or less in the 150 to  
4 the 200 range.

5 As the Court is well aware there is a potential  
6 conflict between class counsel and class members in any class  
7 action settlement.

8 The defendant is willing to settle for some amount.  
9 Here somewhat illusory because it is not real money. It is  
10 claims made. And it has little interest in how that money is  
11 divided between counsel and the class. Class counsel, of  
12 course, has an interest in maximizing their fees. Nothing  
13 wrong with that. We are all trying to make a living. The  
14 class has an interest in maximizing the fees so as to maximize  
15 their share of the settlement fund, which is obviously in the  
16 best interest of claimants.

17 The problem is that only the class counsel and  
18 defendant are at the settlement table. Thus, there is a risk  
19 that class counsel would create an artificially high settlement  
20 fund with a difficult claims process, signing something under  
21 oath, under penalty of perjury to maximize their fees.

22 For instance, if the defendant were willing to spend 10  
23 million to settle the case there is two options. One would be  
24 to create a 10-million-dollar fund, reduced by, say, three  
25 million dollars in fees and guarantee that the remaining seven

1 million goes to the class members or cy pres. We don't have cy  
2 pres here.

3 Option two would be to create a 20-million-dollar fund  
4 less six million dollars in fees, but set up notice and claims  
5 process that the parties believe will result in two million  
6 dollars in claims. Option two is better for both the defendant  
7 who now only pays eight million and the class counsel who  
8 doubles their fee.

9 The class loses under option two because they receive  
10 only two million rather than seven million. Since only the  
11 defendant and class counsel are at the settlement table there  
12 is an incentive to go with option two.

13 The best way that I would propose, Your Honor, to  
14 protect the class, therefore, is to tie the fees to the amount  
15 actually received by the class either directly or through a cy  
16 pres. That creates an incentive for class counsel to maximize  
17 the actual recovery of class members.

18 In our supplemental objection we cited the Court to the  
19 statement of Justice O'Connor respecting the denial of the  
20 petition for a writ of certiorari in *International Precious*  
21 *Metals Corp. vs. Waters*. That is a case that Mr. Nevares  
22 stated several times. I have a different cite because I am  
23 using the Supreme Court cite which is 530 U.S. 1223, 2000((.  
24 Justice O'Connor cited several reasons for limiting fees to an  
25 amount claimed. First, she points out that, setting fees on a

1 hypothetical settlement fund amount will "Decouple class  
2 counsel's financial incentives from those of the class;  
3 increasing the risk that the actual distribution would be  
4 misallocated between the attorneys' fees and the plaintiff's  
5 recovery."

6 Second, she points out that using the hypothetical  
7 benefits "Potentially undermines the underlying purposes of  
8 class actions by providing defendants with a powerful means to  
9 enticing class counsel to settle lawsuits in a manner  
10 detrimental to the class."

11 Your Honor, the Court here can easily protect the  
12 interest of the class by waiting just two or three weeks to see  
13 the actual claims made in this case because the deadline is  
14 August the 10th. Then the Court will know what actual benefit  
15 class counsel obtained for the class. Then, to be fair for  
16 everyone involved in this process, the Court certainly will  
17 award an attorney -- a reasonable percentage of that amount as  
18 attorneys' fees.

19 Your Honor, in sum, we urge the Court to disapprove  
20 this settlement. But if the Court approves the settlement we  
21 urge the Court to deny the request for attorneys' fees or to  
22 delay the request until the Court has an opportunity to  
23 actually see how many folks made claims.

24 Your Honor, thank you very much.

25 THE COURT: Let me ask one question. Let's assume I

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

68

1 wait until the August 10 deadline. There is only 10,000 or  
2 let's assume the estimate is even lower. It is 8,000. My  
3 question is if Ms. Simonet and, again, this has been -- let's  
4 assume this has been just a Puerto Rico class action within  
5 Puerto Rico. If this case were to go to trial, even with the  
6 local class action, and when I say local, I mean residents of  
7 Puerto Rico, I am not just applying Puerto Rico law, but if  
8 this case were to go to trial given the Daubert and all the  
9 motions, summary judgment discovery, and all the hearings that  
10 we would have with certification, going to trial, two or three  
11 months, again, this is not just a simple case. Under Loadstar  
12 and, again, the fees that I have talked about and, again, in  
13 civil rights cases which are much easier than this to try and  
14 don't involve Daubert motions or complicated discovery such as  
15 this, the fees here could be conceivably, as I stated,  
16 anywhere -- it could be in the couple of millions.

17 So, you know, do you have anything to say about that?

18 MR. WEINSTEIN: Your Honor, I was told about you to be  
19 direct. So I will try to answer your question directly. The  
20 fees could be zero because the plaintiffs may not prevail.

21 THE COURT: That is also true. If they don't prevail.  
22 Again, this is not a 1983 case.

23 MR. WEINSTEIN: I have some horrible cases in my office  
24 that we have taken depositions in. The parties in this case  
25 have not taken one deposition yet. I understand that there

1 could be tremendous fees. I am not familiar enough with Puerto  
2 Rico, Your Honor, to discuss what could potentially happen  
3 here. I can tell you in the 5th Circuit this case would  
4 already be over because it could not have been approved as a  
5 class action settlement, in my opinion, I don't think because  
6 it is, the 5th Circuit sits in New Orleans. So we have better  
7 comments from class counsel.

8 If a Loadstar was decided in the 5th Circuit class  
9 counsel would be lucky to see a 1, 2 to a 1.5 multiplier on the  
10 Loadstar. This is what in my opinion give class actions a bad  
11 name. People see notices about the class. They register for  
12 the class. Then, for whatever reason, they may or may not get  
13 a benefit. But when they get 50 dollars and only 200 people or  
14 so make a claim and get 50 dollars and class counsel gets nine  
15 million dollars, that destroys the process and it sets a bad  
16 precedent for other cases.

17 All I am asking for the Court to do is, as a matter of  
18 fairness and policy, to see how many claims are made to  
19 justify, not disputing hard work, Your Honor, but to justify  
20 the amount.

21 THE COURT: Let me say this, what I am going to do is  
22 I'll wait until August 10th. That may very well justify that  
23 they maintain the settlement as it is.

24 MR. WEINSTEIN: Yes, Your Honor. Clearly within your  
25 discretion. The best time to be a federal judge.

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

70

1 THE COURT: What jurisdiction are you from?

2 MR. WEINSTEIN: I am from Texas, Your Honor.

3 THE COURT: You are from Texas. Okay.

4 MR. WEINSTEIN: And, by the way, thank you very much.

5 This is the first time I ever practiced law outside the  
6 continental United States. It is actually every exciting.

7 Even though I have been practicing law as long as these guys,  
8 they are much better preserved than I am.

9 MR. SALAS: It is the warm weather in Puerto Rico.

10 THE COURT: Come more frequently. Mr. Salas has been  
11 coming here for a couple of years.

12 Thank you very much. I appreciate it. I know you have  
13 to catch a plane. Are you flying to Houston or Dallas?

14 MR. WEINSTEIN: I have a meeting in Washington, D.C.

15 THE COURT: You are taking the Baltimore flight.

16 MR. WEINSTEIN: Would it be okay to be excused now?

17 THE COURT: You are excused and your driver is excused.  
18 Very well.

19 Goodbye, Mr. Brown.

20 Okay. Mr. Inserni, are you going to be brief?

21 MR. INSERNI: Very, Your Honor. I am here as local  
22 counsel. I was just asked to reiterate what is in writing by  
23 attorney Pentz.

24 THE COURT: And before counsel leaves, what I will do  
25 is I am not going to issue a ruling on this. I am going to

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

71

1 sleep on it. And I will be issuing a ruling within the next  
2 couple of days. I may wait until August 10th. But I am not  
3 going to issue it today or tomorrow. I am going to sleep on it  
4 and give it careful thought.

5 Thank you.

6 MR. INSERNI: Your Honor, I am just reiterating what's  
7 in writing. I have really nothing more to add. I would like  
8 to make clear for the record that I have been in practice more  
9 or less for the same amount of time as Mr. Nevares and Mr.  
10 Salas and I have no doubt whatsoever of their efforts. But I  
11 am here representing an attorney. I am here as local counsel.  
12 I am here, you know, I submit on his behalf what is in writing.  
13 And I really should not add anything else.

14 THE COURT: So you are not adding anything else.

15 MR. INSERNI: Right. And permission to withdraw.

16 THE COURT: Granted. You are excused as well. And you  
17 adopt any arguments.

18 MR. INSERNI: That's correct.

19 THE COURT: Madame.

20 MS. BONILLA: Michelle Bonilla Sotomayor. I am also  
21 local counsel for William and Kathleen McWhorter and Susan  
22 Colvin, and we basically rest on our papers and adopt all  
23 statements that are not inconsistent with our papers.

24 THE COURT: Okay. Thank you. Last, but not least.

25 MR. WILKINSON: Thank you, Your Honor. Wells Wilkinson

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

72

1 from Prescription Access Litigation here on behalf of objector,  
2 Diane M. Fox. You haven't asked me if I will be brief, I will  
3 try, but I can't promise. I do have a plane to catch myself.

4 THE COURT: Take your time. Where is Ms. Fox from?

5 MR. WILKINSON: Ms. Fox currently lives in Washington  
6 state.

7 MR. STRANGE: She lives in Portland, Oregon according  
8 to her affidavit.

9 MR. WILKINSON: Portland, Oregon. I am sorry.

10 THE COURT: That is close by.

11 MR. WILKINSON: By way of introduction, I would like to  
12 actually just state for the record, the organization that I  
13 work for is called Prescription Access Litigation. We are a  
14 nonprofit organization that was formed in 2001 to try to bring  
15 consumers, unions and senior organizations into the process of  
16 using litigation to try to effect change in the prescription  
17 drug industry.

18 And, unlike my learned brother, I haven't known any of  
19 the attorneys in this case before today. We did object to two  
20 of the prior Paxil cases in 2006 and 2008. But we worked with  
21 different attorneys. Since I wasn't even aware actually that  
22 the counsel here were the same counsel as were in that case.  
23 So our organization is involved in these cases. We primarily  
24 bring them or assist the involvement of consumer-oriented  
25 groups to try to bring these cases and to try to maximize the

YVETTE RICHARDSON, CSR, RPR, CCR



1 benefits and the impact for consumers. So that is our  
2 interest.

3 You know, we are not -- we don't consider ourselves  
4 professional objectors, but we do consider ourselves  
5 professionals in this area. And the two prior objections,  
6 Counsel Strange mentioned in the two other Paxil cases, the one  
7 in 2006 that dealt with consumers, we actually had a number of  
8 points that we raised there that were overruled. But some of  
9 them were actually adopted by the Court at that time as well.

10 And then our objection to the Nichols case in Minnesota  
11 in 2008 was actually something where we negotiated amendments  
12 to the settlement before the date of the final hearing such  
13 that we were happy to withdraw our objection.

14 So there are four or five points that I want to raise  
15 today about our concerns about this settlement. So we can  
16 start with the notice which we feel has been inadequate  
17 generally and is markedly deficient in three specific ways.

18 Our understanding is, and our experience, is that  
19 publication notice is no longer adequate because their means of  
20 identifying potential class members in these consumer drug  
21 cases.

22 And we would prefer to see some process to allow direct  
23 mail notice or, if possible, even preferred some kind of direct  
24 mailing of checks or claims to the members of the class.

25 THE COURT: Let me ask, how can that be accomplished

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

74

1 here because here the problem, and I have been within a class  
2 for securities litigation. All of a sudden I receive a seven-  
3 dollar check six years later. But my address is here and that  
4 is six years later. We have the HIPAA law here. How can they  
5 send the direct notices to everybody? That is one big hurdle.

6 MR. WILKINSON: It definitely is a hurdle, but it is a  
7 hurdle that has been overcome by class counsel in other cases.  
8 There are currently two cases that have received preliminary  
9 approval and their final approval is pending, but it actually  
10 has been supported by their assurances to the Court that they  
11 are going to use subpoenas to the large chain pharmacies and  
12 also to the large mail order pharmacies to gather the names of  
13 consumers and then treat them in a HIPAA-compliant way with a  
14 third-party administrator or with the Court to identify who  
15 these consumers are. And I believe in both these cases there  
16 are proposals to mail them checks or to mail them claims.

17 So one case is called In Re: Average Wholesale Price  
18 Litigation. We cited it in our brief. Another is the First  
19 Databank McKesson band litigation going on in the district  
20 court in Boston. I believe that is cited in our brief, but I  
21 can give you a cite to that as well. There is a way to do this  
22 HIPAA compliant.

23 THE COURT: You say it might be HIPAA compliant, but  
24 what about the person who, and there may be many persons who  
25 decide, I don't even want to receive a check. I don't want to

YVETTE RICHARDSON, CSR, RPR, CCR

1 make a claim because I would rather maintain my full HIPAA  
2 rights, my right of privacy. And let's assume that the federal  
3 judge, I'll make this claim, I am not taking or I have never  
4 taken Paxil, not yet. Sometimes I might think about it, but  
5 let's assume, for example, that, you know, or maybe I don't  
6 want anybody knowing that. I have that right to privacy.  
7 Let's assume that somebody else, a reknown attorney, someone  
8 who is running for political office who took Paxil within a  
9 particular time and no longer suffers from depression or  
10 needs -- there might be many other. There may be many other  
11 examples, but there may be many other persons for 50 or 150  
12 dollars, even if it were higher, would rather not collect any  
13 money. That is a concern I have. How do I protect those  
14 persons?

15 Here we are dealing with, this is diversity action  
16 here. It is not a federal claim. And we are applying Puerto  
17 Rico law. And if we are applying Puerto Rico law, under Puerto  
18 Rico law, under the Puerto Rico Constitution there is a right  
19 to privacy that goes even beyond the federal constitutional  
20 right, the Constitution here is overprotective. And that's a  
21 concern I would also have about, you know, these persons, that  
22 their rights, you know, as a class or possible class members  
23 could be violated by trying to reach other class members. So  
24 that is another concern that I have that, perhaps, in another  
25 state might not apply.

1 Don't blame me. Blame whoever whoever wrote the  
2 Constitution. Actually, Congress approved it. But, again,  
3 that's one claim. Not a claim, but an issue I would have as to  
4 the diversity case.

5 MR. WILKINSON: I do understand that. And I think  
6 there are very important privacy rights in, you know, any  
7 litigation around prescription drugs or even around health care  
8 services received. And I think that there have to be, you  
9 know, very strenuous safeguards that the folks receiving the  
10 claims today that are going to be made by individuals. You  
11 know, the Court has got to be assured that none of that  
12 information will ever get out to anywhere so that, you know,  
13 any Congress person or senator or judge or, you know, someone  
14 who aspired to one of those positions could file a claim with  
15 the claims administrators and know that that information is not  
16 going to get out. I think that is very important to make sure  
17 we do this proactively because people are volunteering  
18 information about drugs they have taken and this is an area  
19 where class members face a certain stigma.

20 THE COURT: But if the list is provided to plaintiffs  
21 and defense counsel. Obviously that list of consumers doesn't  
22 go to Court. I can't do anything. And they are going to have  
23 third parties. Of course I can issue some kind of gag order,  
24 but I am going on one side the benefit of getting a possible  
25 class of people and names out there vs. the rights of privacy

1 of those who don't even want to be put into that class, even  
2 though they are potential class members. That is my concern.  
3 I have to weigh that.

4 MR. WILKINSON: No. I do understand that.

5 THE COURT: Again, that is a right to privacy that  
6 probably goes beyond any right to notification. That is the  
7 concern I have.

8 MR. WILKINSON: Sure. I understand that. And the  
9 Court has got to weigh, you know, has got to extrapolate and  
10 weigh what we think these consumers' interest in terms of their  
11 privacy are with their interest in due process and finding out  
12 about this claim opportunity.

13 You know, I feel confident that if counsel for the  
14 plaintiffs and the defendant were, you know, allowed to see  
15 this information, you know, their professional responsibility,  
16 you know, code and their practices in that area would safeguard  
17 that information quite assuredly. They are certainly privy to  
18 a lot of information that, you know, is potentially, you know,  
19 damaging and very valuable commercially, et cetera. The only  
20 third party I would propose that would see this information  
21 would be the claims administrators who are receiving this  
22 information from claims coming in as well. So I really propose  
23 we expand this to other groups. I would be happy to work with  
24 class counsel and, you know, the Court on finding out more  
25 information about how this is currently being done to be as

1 HIPAA compliant as it needs to be to, you know, have assured  
2 several judges that this is a, fair process that does not  
3 violate people's HIPAA rights.

4 I can't speak to the possible preemption issues rising  
5 around the constitutional protections here in the associated  
6 independent state of Puerto Rico. You know, that, I haven't  
7 looked at all. So aside from --

8 THE COURT: I don't think that there would be that.  
9 HIPAA has that protection, but there is also a right of  
10 privacy. I think both HIPAA and the constitutional right to  
11 privacy goes hand in hand.

12 MR. WILKINSON: Certainly. I do agree. I do agree,  
13 but I feel that even that that is not an avenue that could be  
14 explored then perhaps there are other avenues that could be  
15 explored and are being explored right now. In the *Average*  
16 *Wholesale Price* litigation going on the plaintiffs -- I'm  
17 sorry -- the TPP segment of the class were asked when they  
18 filed claims for their segment of the fund, they were asked to  
19 provide documentation on their consumer's coverage for  
20 something like 386 different drugs that were involved in  
21 litigation. So they are going to help identify class members  
22 using information, you know, that they have. And, again, this  
23 was done in a HIPAA-compliant manner as well.

24 You know, that effort was not explored or, you know,  
25 requested from the Court in this particular case, and we find

1 that to be unfortunate.

2 THE COURT: Let me ask, the other cases that you have  
3 involving the litigation that you mentioned, do they involve  
4 personal damages or are they similar to this case?

5 MR. WILKINSON: No. So those two cases actually dealt  
6 with gaming of the drug reimbursement system or the drug  
7 processing system. In one case it was the manipulation of the  
8 drug pricing used by insurers and also sometimes used with  
9 cash-purchasing consumers to purchase drugs at pharmacies.  
10 That is the First Databank McKesson band litigation.

11 The second was the *Wholesale Price Litigation* and that  
12 was the same set of facts where the prices of certain drugs  
13 that were reimbursed under Medicare Part (B) for doctor-  
14 administered drugs, those prices were manipulated in order to  
15 promote one drug over another.

16 THE COURT: Unless there is a gag order, do you know  
17 what the -- actually there isn't, it is a class action  
18 settlement, but what were the class action settlements in that  
19 case?

20 MR. WILKINSON: The settlement amount in the First  
21 Databank case which deals with 386 drugs is 350 million  
22 dollars.

23 THE COURT: And per person? Per claimant?

24 MR. WILKINSON: Well, I think per claimant it is going  
25 to depend on the number and the frequency of the times they

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

80

1 took those 386 drugs.

2 THE COURT: Okay. So that is a more complicated case.

3 MR. WILKINSON: It is more complicated. It is more  
4 burdensome to subpoena that information from pharmacies because  
5 you are dealing with a lot of drugs, et cetera. Here it would  
6 be somewhat easier. And the *Wholesale Price Litigation*, you  
7 know, there are several settlements in that case, but one of  
8 them deals with 11 drug company defendants. And it is for 125  
9 million dollars. And the third-party payors in both cases, I  
10 believe, they received 80 or 82 percent of those amounts and  
11 the consumers get the smaller balances.

12 And we would love to work with the Court and class  
13 counsel to try to devise some way to improve the notice that  
14 gets out to the consumer class members because we are highly  
15 concerned, given the structure of this settlement, that there  
16 could be very few consumers filing claims. And, you know, that  
17 could lead to, you know, negative policies as described by, you  
18 know, objector Weinstein's attorney just a few moments ago,  
19 which we completely agree with. There are a couple of aspects  
20 that we find --

21 THE COURT: Isn't this the sort of case that, no  
22 matter, let's assume even more money was put in the pot, isn't  
23 this the sort of case because the -- no damages, perhaps  
24 getting a new pill, if you are getting 50 dollars or 150, you  
25 are getting your money's worth and there is no personal damages



06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

81

1 here, at least in this action; no matter what happens, we are  
2 still not going to get too many consumers asking for money  
3 back.

4 MR. WILKINSON: Yeah. We hope not. I mean, it is  
5 unclear exactly how many consumers were affected by this  
6 because there are disputed facts around how many of these pills  
7 were in the stream of Paxil's CR. Right? That is disputed,  
8 but it seems there could be as many as 14 million consumers  
9 that took one of these pills that were split or defective, etc.

10 One of the aspects of the notice that we found in  
11 talking to objector Fox, when we described the notice to her,  
12 she, first of all, said that she could not recall if she had  
13 taken a pill that was split. And she said when she was taking  
14 Paxil she was very depressed. There were times when she could  
15 barely make herself take the medicine. And it does go back to  
16 between four to seven years ago that she would have to remember  
17 this. She said there were times when she was just so depressed  
18 she just could not remember that at all.

19 I think one problem is that the case has been talked  
20 about in terms of being related to these split pills. It seems  
21 like if a pill splits it would be in two halves, etc. But the  
22 release, the release in the settlement is much broader than  
23 that. It says the parties are releasing all claims related to  
24 defective or adulterated Paxil CR manufactured at the Cidra  
25 facility. Therefore, I think it would be more accurate to

YVETTE RICHARDSON, CSR, RPR, CCR

1 solicit claims from Paxil CR consumers who either took a pill  
2 that was split or that they felt was defective. And, in  
3 Ms. Fox's case, she felt she took Paxil CR, and it did not help  
4 her depression at all. There could be biological reasons for  
5 that. Certainly. These drugs don't work the same for every  
6 person. Requiring that the pill be split for a consumer to  
7 know they can file a claim but releasing a different type of  
8 claim makes the notice not as broad as the release that they  
9 are giving up. We are worrying about this pool of class action  
10 members, what they would be giving up.

11 There is another deficiency which, Your Honor, I am  
12 glad you talked about earlier, about the dates that notices  
13 around the right to object were posted, et cetera. And there  
14 is one significant problem with the notice. It is stated that  
15 for your objection to be considered you have to appear in court  
16 today. And, you know, that is not, we feel, a valid rule of  
17 law. Newberg on class actions has stated that that is not a  
18 viable principle.

19 THE COURT: Okay. But I stated there were other  
20 objectors who were not here. They submitted objections in  
21 writing. I mentioned -- not in writing, I mentioned here at  
22 the beginning of the hearing I am going to consider everybody  
23 that is objecting. There is a date for objecting and then  
24 there is a date for appearing. If I cure that by saying  
25 anything that has been filed, duly filed in writing or

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

83

1 notified, I am going to consider. I think -- and also I would  
2 say that almost everything that has been filed over what you  
3 are stating or objector Weinstein stated or anybody else and,  
4 for all purposes, for anybody who even has an objector or would  
5 have liked to object, I can say you have some very good  
6 objections and with Mr. Weinstein and everybody else, I will  
7 consider those objections, if your objections convince me  
8 everybody is going to benefit. And you represent a group, an  
9 interest group, which, in a sense, is like a class action  
10 within the class action here. It is on the count of the class  
11 action for all purposes. The same with Mr. Weinstein. I hope  
12 I got his last name right, Weinstein.

13 MR. WEINSTEIN: Yes, sir.

14 THE COURT: So, for all purpose, there have been  
15 objections. And for all purposes, I am applying these  
16 objections to everyone else. And I don't think that your  
17 problem -- Mr. Weinstein has some more practical policy  
18 objections. You have some due process notice objections, but I  
19 will say, for the purposes of the record, I will consider your  
20 objections. If you prevail, every other possible claimant will  
21 prevail the same as with Mr. Weinstein's arguments or the  
22 arguments of other counsel.

23 MR. WILKINSON: Sure.

24 THE COURT: I will consider for everybody everything  
25 that has been submitted in writing. So I don't think the fact

YVETTE RICHARDSON, CSR, RPR, CCR

1 that somebody couldn't make it here. Of, course, for 50  
2 dollars I am not going to expect them to pay seven hundred  
3 dollars to travel here. The hotels here are more expensive  
4 than probably London or Paris.

5 MR. WILKINSON: I would agree. That would be a  
6 concern. But I also think that there is a possible chilling  
7 effect that were someone to read this notice and understand  
8 that in order to have an objection heard they have to plan to  
9 appear. That really is certainly perhaps moot with the  
10 consumers because they are not going to plan to come down here  
11 for 50 or for a 150-dollar claim to hear the case. But perhaps  
12 a small third-party payor who had significant spending on Paxil  
13 CR during the class period. They may feel this is a little bit  
14 unfair to us because on the TPP claim side the damages are  
15 being, you know, approximated based not on their actual  
16 spending for Paxil CR tablets that are split or even Paxil CR  
17 tablets at all, but just their presence in the marketplace  
18 being a TPP as of the date they filed the claim. Right?

19 THE COURT: But as of today no third-party payor has  
20 objected. You have that concern. But if they were but -- I am  
21 sure the larger ones are probably going to benefit more. They  
22 would probably have objected as well. Nobody has objected.

23 MR. WILKINSON: You are right. The larger ones are not  
24 going to object to this formula. And I think statistically  
25 once you are large enough TPP you are not going to have a

1 spending that does not reflect on average your size in the  
2 market. But a smaller TPP who has 1,000 covered lives or  
3 something like that. And there 40,000 TPPs that got direct  
4 mail notice of this, the settlement.

5 A small TPP with 1,000 covered lives is going to be  
6 eligible for, I believe, a 47-dollar claim. And they could  
7 have one prescription that they filled for Paxil and that they  
8 covered the cost of; and that's going to eat up, you know, any  
9 benefit they would have.

10 So they might have an argument that the damages should  
11 be calculated either based on the approximation or on data that  
12 we submit showing what our actual Paxil CR purchases during the  
13 class period were. Because when they are small, the disparity  
14 between those two could be much greater.

15 And because, you know, small TPPs might have read this  
16 notice and understood that my objections aren't going to be  
17 heard unless I go there. I am not going to bother to do it.  
18 That is a problem. This same provision was actually in the --

19 THE COURT: But at the same time this might be devil's  
20 advocate, but you might have a small TPP, but you could have  
21 several small TPP's that could retain somebody in a group like  
22 yours to represent all of them. They are not here. But you  
23 are here.

24 MR. WILKINSON: I know I am here. But they may have  
25 read. They rely on class counsel to apprise them of their

1 rights and their obligations in the notice. And class counsel  
2 failed, clearly failed to do that by including a provision  
3 which they now recant they are now going to ask you to consider  
4 all objections whether people are here or not. I agree with  
5 that ultimate conclusion, but I think there is a chilling  
6 effect that I think is very bad policy. And this very same  
7 provision appeared in the 2008 pediatric Paxil with third-party  
8 payors. And we objected to it then and the Court struck it.

9 I think it is bad policy, and it was the dereliction of  
10 class counsel's duty to include that in this particular case.  
11 They should know better. I hate to criticize attorneys because  
12 my organization is based upon the premise that we want to get  
13 these class actions filed by private attorneys to benefit  
14 consumers and small third-party payors. So I hate to stand  
15 here and have to do this. But the facts of this case are that  
16 glaring that I have to make that point.

17 And I think there is a difference -- you could possibly  
18 argue that we can't just send claims out to Paxil CR consumers,  
19 individual consumers, because we want to show that they  
20 actually can prove that they were harmed, that they paid for a  
21 pill that was broken or split. But we aren't requiring that of  
22 the TPPs. We are not requiring they showed they spent any  
23 money on Paxil CR. And their ability to keep records and to  
24 show they actually had spending during this class period, four  
25 to seven years ago, is much higher than the average consumer's.

1 Our consumer, that we found, couldn't obtain her records going  
2 back more than three years from two of the nationwide major  
3 pharmacies, CVS and RiteAid.

4 So the burden on her to find documentation for this,  
5 you know, I think it is unfair because it is not the same  
6 burden that is placed on the more busy savvy and sophisticated  
7 third-party payors of the class.

8 So, moving on from, you know, the notice itself, I  
9 think the inadequacy of the notice, i.e. the failure of  
10 innovative and more directed methods to let consumers know that  
11 this opportunity exists is, you know, goes to our complaint  
12 about the reversion to GSK. There is an incentive in this  
13 litigation that the fewer claims by the consumers the more  
14 money reverts to GSK. We find that that is very problematic.

15 The best way to solve this without scuttling the entire  
16 settlement, and we don't want to see that happen, is to require  
17 some kind of additional supplemental efforts to provide notice  
18 to the consumers. So one possible option would be to allow the  
19 claims window to be expanded. There is one case that involved  
20 GSK. I forget which one it was, but in that case there is a  
21 reversionary amount of funds that were left for one year for  
22 any parties who wished to file claims.

23 And I think that would not be unreasonable in this case  
24 because the defendant is gaining a release which, we think, is  
25 perhaps overbroad. They are gaining a release of all those

1 claims. So why not allow a much broader window to allow these  
2 claims to come in? I think that would be beneficial.

3 On the last point of the attorneys' fees, again, we  
4 hate to criticize attorneys' fees because we know this is a  
5 vital public role these class actions play, and we support  
6 them; and, you know, we actively get groups involved in these  
7 cases. But in this particular case there is a potential that  
8 the benefit to the class, to the consumer segment, is very  
9 illusory as counsel Weinstein said a moment ago; and we  
10 completely support all his concerns in that regard.

11 I also would just like to point out that I don't think  
12 that this case is going to be decided based on case law and  
13 precedent. You have an awful lot of jurisdiction discretion,  
14 Your Honor, to make this decision about attorneys' fees. But  
15 some of the cases that have been cited like *Waters vs.*  
16 *International Metal*, that was a very different case and could  
17 be distinguished in that the common fund in that case was  
18 actually -- the size of the fund was related to how much each  
19 class member obtained. The class members' claims were  
20 proportional to a percentage of the common fund. So, in that  
21 case, the bigger the fund the more claimants got. If they  
22 didn't participate in the claims process, you know, at least  
23 the rest of the claims made by class members who did, received  
24 a benefit.

25 And then in the *Master's vs. Wilhelmina* case and I



1 believe it was also called *Williams vs. MGM*. In that case  
2 there was no reversion to the defendant. The money was  
3 actually -- the decision for the Court was to use the money for  
4 increased claims to the existing, increasing the amount of  
5 money given to the existing claimants or a cy pres award. So,  
6 you know, in this case there was a reversion. And I think that  
7 really undermines the potential justification for attorneys'  
8 fees.

9 And I would, you know, strenuously support counsel  
10 Weinstein's suggestion that you continue this fairness hearing  
11 to some date after August 10th. Not only so that we could  
12 evaluate and perhaps brief the issue of whether the attorneys'  
13 fees should be awarded based on looking at the actual claims  
14 that were filed, but we should also look at whether there  
15 should be supplemental notice efforts to try to increase the  
16 number of claims filed, because that is the only way to prevent  
17 all these claims from being released. Right? Which it's going  
18 to happen on August 10th. So the only way to prevent, you  
19 know, that injustice to the consumer class is to try to explore  
20 supplemental notice efforts.

21 THE COURT: Let me ask a question, what if the Court  
22 disagrees with the attorneys fees, rather than 8.5 says 4.0 or  
23 5.0. Would that change your argument? It seemed to me, you  
24 know, not only from you, but from other counsel, from  
25 Mr. Weinstein objecting to the attorneys' fees; fees that the

1 main objection is that, it seems to me that, let's assume that  
2 very few persons make these claims, it's a windfall for these  
3 attorneys who are making somewhat of a fortune, whereas the  
4 actual claimants did not claim that much.

5 The other group of plaintiffs does get the money.  
6 But....

7 MR. WILKINSON: You know, on that point the request of  
8 28 percent of the 11.2 million dollars that are allocated for  
9 the third-party payors, I think that that fee request is very  
10 reasonable. Class counsel has constructed a very creative way  
11 to provide all of the money in the fund going out to parties  
12 who are affected or potentially affected, and I applaud that.  
13 I think that is actually a good thing. I would like to see  
14 that same kind of mathematics and reasoning applied to the  
15 consumers.

16 If it is not, the third-party payor allocation of  
17 attorney's funds, I believe that is 3.1 million dollars. On  
18 the consumers' side, that is 16.8 million dollars, I would like  
19 to see the amount of attorneys' fees that are awarded to class  
20 counsel linked to how well they did not only in creating the  
21 fund that exists, but also creating a notice program that lets  
22 consumers know. You know, so this would mean that, you know,  
23 they would be advocates for supplemental notice come a  
24 continued hearing in mid August or so if their fees were linked  
25 to that. I think that would be very beneficial to the class

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

91

1 and it would eliminate the potential appearance of conflict of  
2 interest in this case.

3 I would hate to see something like one million dollars  
4 go out to 20,000 claims that are filed. Your Honor, our  
5 experience with these cases is that three, four, maybe five  
6 percent of consumers who are eligible ever file a claim.  
7 Right? So the numbers could be that low easily. And so if one  
8 million dollars goes out.

9 THE COURT: Also let's assume they were to send  
10 supplemental notices in the mail and we go around the HIPAA  
11 issue, and I'm talking from personal experience, but I assume I  
12 speak for most of us. When you get notices like this in the  
13 mail that says you may be eligible for 100 dollars or 150  
14 dollars most of us just throw them out. Do you have any  
15 statistics overall on these types of claims and what the actual  
16 number of claimants is? Even if we give the notice as you  
17 would like it to be provided, does it go higher or does it stay  
18 there?

19 I have received things. And it hasn't been HIPAA  
20 related, but I don't -- small amounts of shares for X, Y, and Z  
21 companies and I never, it is like when I get the proxies. It  
22 is like vote for the board of directors. And 99 percent of the  
23 time I throw them out except one company that I like. That is  
24 my other concern. And the other thing I do have a concern,  
25 let's assume Mr. Nevares had litigated this case only as to

YVETTE RICHARDSON, CSR, RPR, CCR

1 Ms. Simonet and prevailed.

2 Again, had he prevailed under the Puerto Rico law  
3 perhaps she would have gotten a very small amount and perhaps  
4 under Puerto Rico law he might not be entitled automatically to  
5 attorneys' fees. But it would have opened up and gone through  
6 the whole exercise of opening up a very dangerous precedent for  
7 GlaxoSmithKline. It is public and then he is going to have  
8 expert testimony.

9 And it is going to be public and then comes a second  
10 lawsuit and a third lawsuit, and that is what GSK wants to  
11 avoid. If they were to litigate, even if it weren't a class  
12 action, if they were litigating separately different claims  
13 by -- let's assume it is not a class action. But cases,  
14 sometimes here in this Court we have them and we have 200  
15 claimants and they all get consolidated. For all purposes, I  
16 have 200 plaintiffs here, but they are all litigated. That  
17 would run up, you know, it could be 10 or 15 different  
18 attorneys litigating. Those attorneys' fees could go higher  
19 than eight million if they have to litigate that here. They  
20 get filed at different times. I may end up with some cases.  
21 If I don't consolidate the cases and some get filed later it  
22 could go to a different judge. It is different statute of  
23 limitations required as to each plaintiff. When did each  
24 plaintiff receive notice or find out that he had a possible  
25 claim. So, you know, we could have minors who don't -- who

1 here in Puerto Rico, if you are a minor and let's assume  
2 someone who was taking Paxil was 12 years old. That case could  
3 get filed, nine years from now. And, in a sense, by doing the  
4 class action they are avoiding all those suits which, you know,  
5 Mr. Nevares could bring. And he has had, for example,  
6 political discrimination cases. He has brought 10 separate  
7 cases. And let's assume that he prevailed in eight of those  
8 cases. He got attorneys' fees and all. And maybe that's from  
9 GSK's perspective they are trying to avoid that multiplicity  
10 and litigation.

11 I don't know if you have anything to add.

12 MR. WILKINSON: Sure. So there class counsel's fees  
13 through this settlement might end up being less than what they  
14 might be awarded if they were to bring these claims  
15 individually under a consumer protection statute, if there is  
16 one here in Puerto Rico.

17 THE COURT: Also for GSK, by settling this, even though  
18 they may be paying individual counsels a bit more than if this  
19 were just one or two plaintiffs, but they are avoiding having  
20 to do that multiple time. So for them it is a windfall because  
21 they are paying a lot of money, but by avoiding what they could  
22 be paying. In the United States there could be other cases.

23 MR. WILKINSON: Sure. I agree that the awards for  
24 attorneys could be greater if they try these cases  
25 individually. And if they were --

1 THE COURT: GSK attorneys are also saving their client  
2 a lot of money. If they litigated 300 cases nationwide they  
3 will make a lot of money, but their client is going to lose a  
4 lot of money. And the way I look at it, and I acknowledge  
5 everything that you stated to the Court, as has prior counsel,  
6 but isn't this, I am keeping in mind, the consumers are there,  
7 I am not forgetting about the consumers, but isn't this sort  
8 of -- this is the sort of case where any individual consumer,  
9 at least based on my ruling here in Puerto Rico law, is not  
10 going to make money. Nobody is going to bring these cases.  
11 And you know, it will probably end up -- they are not going to  
12 end up in small claims court. You have to prove so much. Just  
13 proving one single case is going to cost too much money. The  
14 only incentive for plaintiffs to bring this is to bring this  
15 through a class action.

16 And, again, for the defense, on the other side, from a  
17 business perspective they are going to settle in a class action  
18 because otherwise they are just going to have too much -- they  
19 could have several individual claims. And that is the problem  
20 in this case because if we were talking about personal injury  
21 or more significant claims, then a lot of, you know, and  
22 settlement from the consumer's perspective or from the victim's  
23 perspective that, perhaps, weighs more. But this is the sort  
24 of litigation that, perhaps, you know, the consumers and  
25 everybody else have probably equal weights. And that's my

1 concern. If it wasn't for plaintiffs' counsel here, this  
2 lawsuit, you know, it is very hard to find people to bring it.

3 MR. WILKINSON: Sure. I agree.

4 THE COURT: Not only here, but any other state for any  
5 other class action.

6 MR. WILKINSON: There are cases that we know that we  
7 have been approached by attorneys who identified some, you  
8 know, unfair deceptive practice within the prescription drug  
9 industry and process and they identified the practice to us.  
10 So they made sure that these cases were brought. The class  
11 counsel play a vital role in this. We support the class action  
12 litigation cases to bring these cases that would not be brought  
13 otherwise.

14 But the caveat is the class counsel, once they are put  
15 in this case are put in the difficult position, as counsel  
16 Weinstein described earlier, that they have the potential to  
17 receive attorneys' fees that are significant. And the  
18 defendant wants to get peace from the case, the general release  
19 that will make it go away nationwide. But it is the consumers  
20 that we are most concerned about. And the judge in these cases  
21 has to play a heightened role scrutinizing what the terms of  
22 the settlement are because the judge acts as a fiduciary on  
23 behalf of all the absent class members.

24 It is different than, you know, the normal litigation  
25 where the two parties are before the Court.

1 THE COURT: What if I play the more active role and I  
2 say, no, no, I am not going to approve this. And eight million  
3 go to cy pres. And I wait until August 10 and there is eight  
4 million they will have to hand out. The cy pres money also is  
5 never going to go to consumers anyway.

6 MR. WILKINSON: Right. So I would support cy pres as  
7 an alternative way to try to benefit consumers who are harmed  
8 by whatever practice was alleged. And an alternative benefit  
9 received in exchange for their release. Right? So cy pres  
10 award, in many cases, can be appropriate especially in many  
11 cases like this where it may be hard to identify which  
12 consumers took a split pill, especially in cases where the  
13 nature of the class members themselves makes it harder for them  
14 to self-identify and say, "Yes, I did take a split pill."

15 I mean, split pills are not uncommon. People split  
16 their own pills regularly. So if you open a bottle of Paxil CR  
17 and find that pills are broken or split you are not going to  
18 know that these pills are not going to work. Class members are  
19 not going to know at that moment that they have been harmed.  
20 They have paid for something that was defective. In this  
21 particular case a cy pres award might be the most warranted  
22 because it is hard for the class members to come forward.

23 THE COURT: Okay. But that cy pres award, those class  
24 members would never see a cent of that cy pres award.

25 MR. WILKINSON: They wouldn't. But there would be



1 benefits to -- there can be benefits through public education  
2 and advocacy, teaching consumers about, you know, the risks of  
3 taking pills that are defective. What to look for when you  
4 open your prescriptions if the pills are broken, how to read  
5 and understand labels to know that a controlled release drug  
6 means that the integrity of the pill itself is relevant.

7 THE COURT: Isn't that something, for example, at least  
8 GSK, I am sure, and again, I am not putting words in their  
9 mouth, but, I am sure that from this experience they are going  
10 to take a big look at labeling to avoid future cases like that.  
11 Isn't that something that, you know, because, obviously, if  
12 they don't do this, and let's assume that for Paxil, for any  
13 other drug, I am sure for all those labels, and when they  
14 advertise drugs to doctors, they can perhaps insure they are  
15 going to have a bit more of an aggressive campaign. Don't take  
16 the split pill. Bring it back or take it to the doctor. You  
17 know, they can do that outside of the settlement. And I am  
18 sure they are probably going to do it because they don't want,  
19 obviously, this case is going to get settled hopefully.

20 The public is going to know about it and then every  
21 time there is another split drug they are going to sue them  
22 again and bring a class action.

23 So can't the industry itself take those precautionary  
24 measures?

25 MR. WILKINSON: Well, you know, with all due respect to

1 my brothers here on behalf of GSK, I don't think the industry  
2 takes those proactive steps even after litigation has happened.  
3 And I think in this particular case, this case is flying over  
4 the radar. Most consumers don't know about this case. We  
5 talked to something like 20 people who are consumers who signed  
6 up through our web site or other means and who had taken Paxil  
7 and none of them had heard about this settlement at all. And  
8 none of them had taken Paxil CR. Half of them knew they hadn't  
9 taken Paxil CR. The other half of them were not sure whether  
10 it was Paxil or Paxil CR that they took.

11 So consumers have not been educated about what to look  
12 for just by the presence of the litigation here. And they  
13 certainly haven't been educated about the opportunity to file a  
14 claim. So we feel that those things would warrant a cy pres  
15 award as an alternative. Unfortunately, the Court is faced  
16 with a decision with this settlement of --

17 THE COURT: What about the persons who have filed  
18 claims by now, who have been diligent and perhaps represent  
19 that 80 percent of the people who read. You know, and I don't  
20 think there is no way of knowing perhaps the persons you  
21 communicated to, that particular group doesn't read. Again, I  
22 don't know.

23 And, again, for example, I haven't seen any. Of  
24 course, I approved this. I know about it, but I haven't read  
25 anything or perhaps seen anything in the paper where, you know,

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

99

1 maybe I read or maybe I have seen something about Paxil. But I  
2 am not taking Paxil because I do see those ads, not for this  
3 case, but I do see them on TV or radio or cable or local TV.  
4 You open up the newspaper and there is a big article. I know I  
5 am not taking that. And I have seen them for different  
6 multiple drugs. I think it is not Viagra. It is the other  
7 company. There have been some recalls recently. You see the  
8 publicity when you look at the magazines or the ads on TV,  
9 please call blah, blah, blah.

10 MR. WILKINSON: I agree. Just that, you know, just  
11 seeing one of these ads sometimes is not enough to spur a  
12 consumer to act. I think as the affidavit submitted by  
13 Ms. Cancelo, the agent hired to do the notice program, I think  
14 her statistics estimate that something like 80 percent of the  
15 class members have seen -- are calculated to have seen one of  
16 these ads twice.

17 THE COURT: In this case.

18 MR. WILKINSON: In this case, right.

19 THE COURT: In this case this is consonant with  
20 counsel's estimate.

21 MR. WILKINSON: I think it was based on her affidavit.  
22 I think their estimate was based on that affidavit. You know,  
23 just seeing one of these ads two times does not necessarily let  
24 you know, you know, this is about you. This is something you  
25 can participate in. People see. Information overload happens

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

100

1 when people sees these things all the time.

2 THE COURT: You don't have somebody who submitted like  
3 an affidavit or an expert to tell the Court that. You only see  
4 it twice or three times.

5 MR. WILKINSON: I don't have that expert. I don't have  
6 that evidence. The only evidence is the one consumer we spoke  
7 to who has not heard the evidence at all. She is an educated  
8 person, a Ph.D., a sociology professor, very interested, and  
9 concerned, but had not known about the settlement at all. That  
10 is the problem with these traditional al forms of a publication  
11 notice. It doesn't reach people.

12 THE COURT: Let's assume that everything she says is  
13 100 percent truthful, but I would be weighing her  
14 representations versus at least, you know, eight to ten  
15 thousand persons who already filed claims: And I assume, you  
16 know, we have persons in New York, Florida, Texas, Montana,  
17 Idaho, Guam, you know Oregon, at least we have one in Puerto  
18 Rico.

19 MR. WILKINSON: On August 11 we are going to be faced  
20 with a decision of what to do about -- let's say, 10,000 claims  
21 are filed. That is going to turn into a half a million dollars  
22 worth of claims sent out if they are all in the 50-dollar  
23 range. Then the Court has got to, you know, got to decide what  
24 is fair to the absent members of the class. Is it better to do  
25 some kind of supplemental notice in exchange for the claims

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

101

1 that are going to be released. Is it fairer to extend the  
2 claims deadline period to a large enough window to let people  
3 find out about the settlement and participate? Or should the  
4 settlement just be rejected? There are not enough consumers  
5 releasing their claims participating to make this release worth  
6 while. That puts the consumers back in the boat, the failure  
7 of the litigation by class counsel. It is not like they got  
8 nothing. Their fate is to litigate the class action forward.  
9 Right? I don't support -- this one case is --

10 THE COURT: This case has already been certified as a  
11 class. Am I correct?

12 MR. WILKINSON: Your Honor, I was not aware that was  
13 true actually. But my involvement in this case started, you  
14 know, three days before the objection deadline when we first  
15 found out about the case.

16 THE COURT: The problem is even though there being a  
17 class nobody opted out of the class.

18 MR. WILKINSON: Okay. I thought this was a settlement  
19 class where it was certified for purposes of settlement and the  
20 first notice about the case went out with the claims.

21 THE COURT: You are correct and, Counsel, not that the  
22 class was certified and then there was a settlement. You are  
23 correct.

24 MR. WILKINSON: Okay. All right. You know, consumers,  
25 why are they going to opt out? My concern -- my concern is not

1 the consumers --

2 THE COURT: Then I approved the class and Mr. Nevares  
3 litigates the case. I am also sure if there are going to be  
4 objectors to the class we would have, perhaps, you and counsel  
5 Weinstein and the two other counsel and that's -- again, I have  
6 had class actions. I have had at least one big class action  
7 that was settled for 77 million dollars; and that involved 1st  
8 Bank. It involved shares of stock that were advertised or sold  
9 and allegedly weren't worth what they were sold for.

10 Once the 12(B)(6) was denied, as is in this case, the  
11 case got settled. In that case I think there was only one  
12 objector. Again, that was a case where every individual  
13 person -- and that is a case where you have names and it is  
14 easier for everybody to get the money. In that case there was  
15 only one objector. Nobody showed up. And I have another class  
16 action I am working on. And that's my -- at least, from my  
17 experience, not too many people object to these things.

18 Going back, I don't think Mr. Nevares was involved in  
19 that case, it was a Rico antitrust case here involving Volvo 15  
20 years ago. I think the final settlement, Mr. Barrios was  
21 involved in that case. I think that case -- it is no secret --  
22 what everybody got at the end was a fifty-dollar certificate  
23 or.

24 MR. BARRIOS: It was overturned on appeal, Your Honor.  
25 They got nothing.

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

103

1 THE COURT: At least some people got the certificate  
2 early on. I remember the settlement that was approved at some  
3 point was like 50 dollars. And I think that case got  
4 litigated. It was a class action. What happened was there was  
5 no settlement. But it was a class action, but it was like 50  
6 dollars what everybody got. Some people did get the  
7 certificate and probably used it before the appeal. But it was  
8 like 50 dollars. Am I correct, Mr. Barrios, something like  
9 that?

10 MR. BARRETO: I don't remember Your Honor.

11 THE COURT: That was a case that was not very high that  
12 actually got litigated.

13 MR. WILKINSON: I have seen cases where, cases like  
14 that where you can actually mail notice to every class member  
15 and they have the opportunity to choose to opt out or not. And  
16 my concern here is that the notice was not disseminated broadly  
17 enough so a lot of people don't know and they didn't choose to  
18 opt out. The decision to opt out were erroneous so they  
19 thought they had to come down here to the beautiful associated  
20 independent state of Puerto Rico to opt out -- to object -- not  
21 to opt out, but to object. So I think the reaction of the  
22 class is not a good indicator of the support of the settlement.  
23 But, personally, but I am really most concerned about the  
24 absent class members who haven't heard about it at all who are  
25 being asked to release claims.

YVETTE RICHARDSON, CSR, RPR, CCR

1           And I think, rather than scuttle the settlement and  
2           provide nothing to consumers and third-party payors I would  
3           like to see the Court require supplemental notice that explores  
4           different ways that are HIPAA compliant to identify consumers  
5           who might be able to participate.

6           THE COURT: Okay. Let me ask one final question.  
7           Wouldn't you judge this case, if you were in my position,  
8           differently from a case of Paxil which caused personal injury  
9           versus a case there is no personal injury. Personal injury is  
10          not a claim. Isn't it different? Because I think in the  
11          personal injury case, if this were the scenario, I would give  
12          much more notice because I would be settling this case for  
13          persons who conceivably would be injured.

14          And it is very hard. And perhaps the class would be  
15          different because, but, again, this is just a specific class of  
16          persons who have taken the split Paxil and they didn't get  
17          their monies worth for that pill. Because I believe that -- I  
18          lost the opinion, but I believe there were some other claims  
19          here that got dismissed that GSK prevailed. But what is left  
20          is the broken -- this is not a case, even though it is  
21          important for consumers, I don't think this is a case that,  
22          again, these are not pills. There is no allegation here in the  
23          settlement that this caused cancer or somebody became impotent  
24          or had birth defects. That would be, in my opinion, a very  
25          different scenario. And, probably, you know, under these terms



06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

105

1 I wouldn't be settling that. The notice would have to be much  
2 different. This is a different case. It probably only  
3 involves 50 dollars. It could be more, 150. Most people  
4 aren't going to go through the trouble to fill out the  
5 paperwork. Most people see under, "Penalty of perjury," I have  
6 to sign this. You know, and again, 10,000 -- if we get 15,000  
7 or 20, that is a big number.

8 MR. WILKINSON: The reticence of consumers to know they  
9 were harmed, right, or even if they know they were harmed  
10 financially by buying a product that didn't work, right, they  
11 are going to be able to understand that or their reticence to,  
12 even if they do see a notice to the class, by filing a claim,  
13 both of those are proactive to send the consumers who we can  
14 best identify, a claim, because they are giving up, they are  
15 releasing these claims. So they should get something in  
16 return.

17 THE COURT: Let me say something else, because if this  
18 case is settled through the class action and over your  
19 objections and Mr. Weinstein's objections, this settlement does  
20 not preclude anybody who would conceivably have any personal --  
21 let's assume somebody through this because of a split pill had  
22 some personal injury here in this jurisdiction or any other  
23 jurisdiction from bringing that claim because that has not been  
24 settled here. What has been settled here are the claims that  
25 survived and the plaintiffs that was here.

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

106

1 But if a new plaintiff comes in and there is no statute  
2 of limitations they can raise, you know, that's not precluded  
3 by the settlement.

4 MR. WILKINSON: Right. So this settlement is only  
5 about economic damages. I agree.

6 THE COURT: I issued a -- you know, I have an opinion  
7 denying the motion to dismiss. But because it's been settled,  
8 for all purposes it's, you know, obviously that might apply to  
9 the plaintiffs in this case. But it doesn't apply to, and I  
10 think counsel, you agree with me, this doesn't apply to other  
11 claims and other plaintiffs.

12 MR. WILKINSON: That's correct. I think other claims  
13 face a statute of limitations problem. But, Your Honor, again  
14 that is not a matter before the Court.

15 THE COURT: Let me say this, this is not one of these  
16 cases where it is an MDL case where we would conceivably have  
17 because we have some other MDL cases. If this were a multi  
18 district litigation case perhaps we would have a Paxil claim in  
19 California, one in Minnesota, New York, southern district,  
20 eastern northern district, Florida district and Texas, we  
21 probably wouldn't be here. We have the California claim and we  
22 have the Puerto Rico. So it is probably not too many attorneys  
23 even interested in bringing in these claims as a class action.

24 MR. WILKINSON: Right. I understand that that is how  
25 this case started, but the release is nationwide. It affects

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

107

1 the consumer we found in Portland, Oregon. It affects any  
2 other consumers that we don't find and the claims process does  
3 not find. And I am most concerned about the absent class  
4 members receiving adequate notice and that is -- so they can  
5 participate in the settlement.

6 My subsidiary concern is that the structure of the  
7 settlement, you know, is out there on record such that the  
8 attorneys' fees are not linked to what we feel is their, you  
9 know, aligning their interests with that of the consumer class.  
10 I think that is very troubling to us to see this settlement  
11 structured in the way it is.

12 THE COURT: Okay. Thank you very much and I appreciate  
13 it.

14 You are welcome to stay. I know you have to catch a  
15 plane, if you need to leave. Thank you very much. And, again,  
16 I will issue my ruling at some point. Just to let you know,  
17 thank you very much. And even if I don't agree with you in  
18 this case, again, I am going to think about it. But you have  
19 illuminated the Court because I do get a lot of class actions,  
20 but you may not prevail here, but in the long run you have been  
21 very informative. It may help in other cases, if not  
22 indirectly.

23 So thank you very much. And you are always welcome  
24 here to object in any other case.

25 Okay. Some minor questions of counsel. Let me just

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

108

1 ask both sides, because, again, I haven't approved the final  
2 settlement. Let's assume I feel comfortable with the  
3 settlement and this is a hypothetical. I am not saying I  
4 don't. But let's assume I am saying I don't feel comfortable  
5 with the 8.5 million. I would feel comfortable approving the  
6 whole settlement but with attorneys receiving let's say 6.5  
7 rather than 8.5. What would be the parties' contention? Would  
8 you go through with the settlement or is it an all or nothing  
9 settlement?

10 MR. STRANGE: Your Honor, you have the discretion to  
11 approve whatever attorneys' fees you think are appropriate. If  
12 you approve the settlement the settlement is approved.  
13 Whatever fee you approve we will take it.

14 THE COURT: So you submit it to me for approval subject  
15 to any modifications.

16 MR. STRANGE: With respect to the attorneys' fees. Not  
17 with respect to the settlement.

18 THE COURT: It is important because it is important  
19 that if I do approve the 8.5 or I reduce it somewhat a bit, but  
20 it is important that I will obviously let it be known in the  
21 opinion that it is because the Court has decided that that's  
22 what is approved and not that it is the parties and the Court  
23 is rubber-stamping it.

24 MR. STRANGE: Yes, your Honor.

25 MR. HEROLD: Your Honor, if I may address that. I

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

109

1 agree with what Mr. Strange has said, and would direct the  
2 Court specifically to paragraph 20 of the settlement agreement,  
3 which lays out whether or not either party can terminate the  
4 settlement based on what the Court does. And essentially what  
5 it says is that if the Court changes a material provision of  
6 the settlement agreement itself then either party would have  
7 the right to terminate. But if the Court awards attorneys'  
8 fees in whatever amount, that is not a ground for termination.  
9 But GSK has no position.

10 THE COURT: Mr. Nevares seems he wants to settle for  
11 the one dollar.

12 MR. HEROLD: I am not suggesting that.

13 THE COURT: I will seriously look into that. For  
14 example, the cy pres issue, that will allow the parties to  
15 withdraw from the agreement.

16 MR. HEROLD: Correct.

17 THE COURT: I don't have any other questions. If there  
18 is anything briefly that anyone wants to bring up.

19 Let me say this, I am very inclined, for the reasons I  
20 have stated, to approve the agreement as it is. I am going to  
21 sit a little bit more on the attorneys' fees. I think you are  
22 all, in what I stated, you are very entitled to attorneys'  
23 fees. And I did my Loadstar analysis. It does benefit you.  
24 And I think this case -- this case, if it had been litigated it  
25 would have taken -- it probably would have earned counsel

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

110

1 attorneys fees. So I think the attorneys' fees are necessary  
2 for this type of litigation to move on and be settled. And so,  
3 again, if there is any reduction, percentage-wise I don't think  
4 it is going to be significant. There may not be any reduction.  
5 Again, I want to sleep on it. I just want to let you know that  
6 I am very inclined to, as I stated earlier, to approve the  
7 agreement.

8 This does not involve personal injury. It only  
9 involves the split pills. And it is a just consumer claim.

10 From my experience with the other litigation, the 1st  
11 Bank litigation, nobody objected.

12 So, and okay.

13 Mr. Strange?

14 MR. STRANGE: Thank you, Your Honor. I will keep it  
15 brief in light of your comments, but I did want to make the  
16 point with respect to the PAL objections in that I think  
17 counsel misspoke. They didn't object in Nichols. Nichols is a  
18 reported decision against GSK that I cited to the Court where  
19 the Court in approving that settlement held that you don't have  
20 to consider the amount claimed. It is on the total fund. But,  
21 PAL did object to the *Hormon* settlement, which was a settlement  
22 I was involved in in Illinois that was a claims-made fund just  
23 like this, no reversion just like this; and we have attached  
24 for the Court as an exhibit to our response to the objections  
25 Exhibit A, a copy of PAL's objections. And they are identical

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

111

1 to the ones they made here. They made an argument that you  
2 have to do it on the amount claimed; and that the Court should  
3 delay the approval until you find out how much is claimed. And  
4 there should be a cy pres.

5 In overruling those objections the court in *Hormon* and  
6 we recorded it on page 57 of our response to the objections  
7 made an important point which is that if the case proceeded to  
8 trial and there was a verdict, the defendant would still be  
9 entitled to a reversion of the funds depending on how much  
10 people claimed. And citing the *Boeing* case. That is the main  
11 point. That is why the judge in *Hormon* overruled that  
12 objection. And that is why the Courts continually overrule  
13 that objection.

14 And with respect to the issue of whether the fee should  
15 be based on the amount of claims or the fund made available,  
16 the reason that the defendant or that the objectors talk about  
17 a policy reason is because the law is to the contrary.

18 And that's in the *Waters* case that Mr. Nevares already  
19 cited to Your Honor. And that case held "no case is held that  
20 a district court must consider only the actual payout  
21 determining attorneys' fees." And that court cited to the  
22 *William's* case where the 9th Circuit said a district court  
23 abuses discretion by basing the fee on the class members'  
24 claims against the fund rather than the percentage of the fund.  
25 Because in these types of cases, Your Honor, as Your Honor

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

112

1 knows from the Loadstar, they are very difficult to pursue  
2 against a very established defendant who hires very capable  
3 counsel. And that's why, with all the work we have done --

4 THE COURT: And local counsel.

5 MR. HEROLD: That is what he meant, Your Honor.

6 MR. STRANGE: That is what I meant. We have worked on  
7 this case for five years. We have thousands of hours. Just  
8 our Loadstar alone is 4.2 million. And so to get them to put  
9 up this size of a fund --

10 THE COURT: When you say, "4.2," you mean 4.2 for  
11 Puerto Rico or you include California.

12 MR. STRANGE: All of the California cases. All the  
13 lawyers on the plaintiffs' side.

14 THE COURT: By settling this, the California case is  
15 being settled as well. This not only takes care of Puerto  
16 Rico, but it is taking care of that California case, which is  
17 more advanced than Puerto Rico. In a sense, when I made my  
18 calculation of the Loadstar, even if it goes down to three  
19 million, you still have to consider the California case, which  
20 could add up to what you actually requested in attorneys' fees.

21 MR. STRANGE: Yes, Your Honor. Actually, I think the  
22 volume of pleadings in that case right now is taller than Your  
23 Honor because we've gone through two class certifications  
24 motions we filed and all the numerous 11 motions to dismiss  
25 just in that case alone.



06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

113

1           So I do appreciate the time, Your Honor, and we have, I  
2     think, put together a settlement that has a substantial benefit  
3     to the class and I appreciate it.

4           MR. HEROLD: Okay. Your Honor, I have just a few very  
5     quick comments. First, is that we discovered that the order  
6     that was submitted to Your Honor, the final approval order was  
7     out of date so we prepared a new one. It reflects all the  
8     objections and a few other things.

9           Thank you, Your Honor.

10          And secondly, just to comment very quickly, I notice  
11     that my friend from PAL mentioned that the -- what he called  
12     the traditional forms of notice are something that PAL doesn't  
13     like or wants to add to. And there is a reason that the  
14     traditional forms of notice, which are the forms used in this  
15     case are often used. And you've touched on most of them for  
16     this case. That is, if you require subpoenas to find private  
17     information about people taking antidepressants that creates a  
18     whole new set of issues. And he cited to two cases, both of  
19     which I am unfamiliar with, the AWP case and another case in  
20     Boston. Both the same judge. He didn't have any  
21     antidepressants involved, at least to my knowledge, Your Honor,  
22     in those cases.

23          There is also the expense, Your Honor. I liken this to  
24     the traditional form. This case is sort of a Cadillac of  
25     notice. It is a good solid traditional notice program. He is

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

114

1 asking for what I call the Ferrari of notice. It is very  
2 expensive and it is dangerous because it sets a precedent.

3 THE COURT: And I think that notice, if this involved  
4 personal injury or any other type of injury or possible harm to  
5 a fetus or something like that, in the '60's litigation, you  
6 might need a Ferrari. You might need a Lotus. You might need  
7 a Lamborghini notice. But, again, based on my experience and  
8 that 1st Bank litigation and class action settlement, it is not  
9 that many people actually.

10 MR. HEROLD: Right. And we think this notice is well,  
11 well within the realm of the types that are traditionally  
12 approved. I just wanted to make that point.

13 THE COURT: Mr. Nevares.

14 MR. NEVARES: Mr. Salas.

15 MR. SALAS: Just a couple of things. I listened to  
16 Mr. Wilkinson's statements and I almost felt like, you know, I  
17 could go and have a glass of wine with him and talk about those  
18 things. But it was important, despite everything that he said  
19 to the Court. He really didn't bring any proof to the Court  
20 and this is a Court of proof.

21 THE COURT: I know we only have that person from  
22 Oregon. It is at least 10,000 thousand, maybe let's lower it  
23 that to 8,000 persons. So I note that.

24 MR. SALAS: On the HIPAA that he was suggesting,  
25 despite the fact that it is illegal in the HIPAA for anybody,

YVETTE RICHARDSON, CSR, RPR, CCR

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

115

1 even a requester of any kind to obtain that kind of information  
2 that he wanted us to obtain, he said that his own client could  
3 not obtain records from the drugstore that were more than three  
4 years old. So even if you were to order anybody to try to get  
5 that information, by his own client's own experience, those  
6 records are not available because the class period here ended  
7 in 2005.

8 So it was totally what he was he was talking about were  
9 dreams, really, the way I felt. Your Honor, the way -- the  
10 only other thing that I wanted to say was that with respect to  
11 the amount of attorneys' fees in the *Waters* case which, of  
12 course, the Supreme Court denied a writ. That was an award of  
13 33 percent on a reversionary fund on 40 million. The Court  
14 specifically addressing the issue said in *Boeing vs. Van*  
15 *Gambert* the Supreme Court settled this question by ruling "that  
16 class counsel are entitled to a reasonable fee based on the  
17 funds potentially available to be claimed regardless of the  
18 amount actually claimed." That is a direct quote in the *Waters*  
19 case. So the law says that what really the amount that you  
20 need to consider is the settlement fund that we have created.

21 Now, having said that, the district court has great  
22 latitude in giving the award as long as you explain your  
23 reasoning. And if you explain your reasoning the latitude that  
24 you are given by the law will not be disturbed by a court on  
25 appeal.

YVETTE RICHARDSON, CSR, RPR, CCR

1           So what I am telling the Court is based on the law,  
2           based on everything that you have heard here today and the  
3           statements that the Court has made during this hearing, you  
4           have great latitude to give an award that is justifiable, Judge  
5           and I think the amount of attorneys' fees that we have  
6           requested is what the law entitles us to get. It really  
7           reflects the amount of work that we have put into this case;  
8           the risks that we have taken over the past five years in as  
9           much as even we, Mr. Nevares and myself and other counsel, we  
10          have given up a lot of other case. We have passed up a lot of  
11          other opportunities to dedicate ourselves to this case. We  
12          have put money out of our own pocket to the risk in this  
13          venture. It is not that we ran around making money not doing  
14          any work.

15                I would just say all these attorneys who came here to  
16          object, where were these guys for the past five years? Why did  
17          they not help us? Why did they not come and help the class if  
18          they are really interested in the class? Thank you, Your  
19          Honor.

20                THE COURT: Thank you.

21                Anything further?

22                MR. WILKINSON: No, Your Honor.

23                THE COURT: Thank you. You are excused.

24                What I will do, obviously I have to make some written  
25          findings. I don't think anybody is requesting a transcript at

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

117

1 this time.

2 Okay. Right?

3 MR. NEVARES: No.

4 THE COURT: I will use the rough draft for my own  
5 internal purposes.

6 Thank you very much.

7 MR. NEVARES: Thank you, Your Honor.

8 (Whereupon Court was adjourned)

9 - - - - -

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

06CV1230 - ALMA SIMONET, ET AL., v. GLAXOSMITHKLINE - FAIRNESS

118

REPORTER'S CERTIFICATE

I, YVETTE RICHARDSON, Official Court Reporter in the United States District Court for the District of Puerto Rico, appointed pursuant to the provisions of Title 28, United States Code, Section 753, and a Registered Professional Reporter certified by the National Court Reporter's Association, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared under my direction.

Whereunto I have set my hand this 28th day of January 2010.

S/YVETTE RICHARDSON, CSR, RPR, CCR  
Official Court Reporter

YVETTE RICHARDSON, CSR, RPR, CCR